

MS INTEGRATED HR CONSULTANCY– LOCUS CLASSICUS CASES ON HANDLING DISCIPLINARY HEARING

NYARADZO WORKS COUNCIL TRAINING PROGRAM - SEAL SIMON MAZORODZE HARARE

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LOCUS CLASSICUS DEFINITION

- Latin legal term referring to “topical” or “leading cases” in a particular area
- This presentation focuses on such judgments relating to how to handle disciplinary hearings.
- Why is it necessary? Courts have spoken on issues relevant to your Codes of Conduct. Most cases are dealt with in ignorance of the principles of law set out for such cases.
- Every member of the Works Council may be required to conduct the hearing in one capacity or the other. **Section 34(1) of SI 117 of 2022 (Funeral Industry Code)** provides that;

‘The provisions of the code of conduct incorporating the disciplinary code and grievance procedure shall be observed by all employers and employees and the parties to this Agreement hereby agree to ensure that all such provisions are complied with.’s

A PEEP INTO THE APPLICABLE CODES

- **Section 10 of the Funeral Industry Code** requires there to be managerial and worker representatives in a Disciplinary Committee. Section 11(a)-(i) outlines the detailed functions of Disciplinary Committees and these all seek to ensure that a fair hearing is afforded to employees. The procedure is further elaborated in **Section 12 of the same code** all meant to comply with principles of natural justice
- **Section 3(1) of the Furniture Industry Code** also envisages management and workers representatives in Disciplinary Committee
- **Section 3 of the Insurance Industry Code** defines ‘disciplinary committee’ and ‘appeals committee’ as consisting of both workers and management representatives. In **Section 14(2)**, the workers council is made responsible for hearing and resolving employees group grievances
- **Section 3 of the Tourism Industry Code** also defines ‘Disciplinary Authority’ to include a ‘disciplinary committee’. Workers representatives are also stated to be capable of nomination to such committees.

THE NEED TO STRICTLY FOLLOW PROVISIONS OF A CODE

- **ZIMBABWE PHOSPHATES INDUSTRIES (PRIVATE) LIMITE v DZIMIRI SC 44/2017** – the failure to comply with the mandatory provisions of s 6(3) renders the decision of the disciplinary committee of no legal effect.
- that as regards authorities dealing with the question of prejudice where one challenges a dismissal on the basis of procedural technicalities, (**Nyahuma v Barclays Bank of Zimbabwe SC 67/05**) in this case we are not dealing with an academic situation but the performance of a statutory function by a disciplinary committee which was not constituted according to the provisions of statute and which the statute prohibits from conducting proceedings. A party tried by an improperly constituted disciplinary committee cannot be said to have suffered no prejudice especially if such disciplinary committee is specifically prohibited from conducting any such proceedings.

DIFFERENCE BETWEEN COMMITTEE AND AUTHORITY OR OFFICER

- **MADZIYAUSWA V ZFC LIMITED AND ANOTHER SC 73/2015; NATIONAL ENGINEERING WORKERS UNION v DUBE SC 01/16** – Committee has equal representatives while Authority or Officer has one or more but all appointed by employer.
- Check what your Code says and follows that.

IMPROPER COMPOSITION OF THE HEARING

- **CHIDEMBO V BINDURA NICKEL CORPORATION SC 35/2015** - where a challenge is anchored on improper composition of the hearing panel, an appellant should explain in what way he perceives the Code of Conduct to have been violated, at what stage of the proceedings this might have happened and who in his opinion should have properly constituted the disciplinary authority.

FRAMING THE CHARGE LETTER

- **NYARUMBU V SANDVIK MINING SC 31/2013** - in disciplinary proceedings a person cannot be found guilty of an offence that has not been preferred against him, unless that offence is a competent verdict on the offence originally charged. The reason for this is obvious, viz. The person accused must be made aware of the case against him in order to enable him to effectively prepare his defence. So the charge letter must be specific.

SUSPENSION

- **MADZIYAUSWA V ZFC LIMITED AND ANOTHER SC 73/2015** - a suspension is not an integral process in disciplinary hearing proceedings. A suspension may precede a disciplinary hearing. It is however, not mandatory that in every case there be a suspension before disciplinary proceedings are commenced. Stated differently, there is no requirement that an employee must be suspended pending disciplinary proceedings, the discretion being that of the employer.

INQUISITORIAL APPROACH TO A HEARING

- **MAJURIRA v TREDCOR (ZIMBABWE) (PVT) LTD SC 48/2013** - that taking an inquisitorial approach in chairing a disciplinary hearing is not evidence of bias and is no breach of the nemo judex rule.

ON THE RIGHT TO LEGAL REPRESENTATION AT WORKPLACES

- **Zupco v Onson Mashinga SC 42/2017** – employees have a constitutional right to be represented by a legal practitioner at any “forum” even for matters that have not yet been taken to the NEC or to a labour officer.

ROLE OF WORKERS COMMITTEE REPRESENTATIVES IN HEARINGS – ARE THEY FREE TO DO WHAT THEY WANT?

- **ZESA v MOSES MARE SC 43/05 AND CHIDEMBO V BINDURA
NICKELCORPORATION SC 35/2015-** members of the Workers' Committee are not a law unto themselves ...In defending the rights of the workers, a member of the workers' committee is enjoined to observe due process."

ON WALKING OUT OF DISCIPLINARY HEARINGS

- **Servcor Private Limited v Guri And Others SC 40/2016** - *the law is settled that one cannot challenge the conduct of disciplinary proceedings which he or she deliberately did not take part in, that is to say where an employee has deliberately chosen to abscond from the hearing such employee cannot appeal against the decision on allegations that his or her right to a fair hearing has been infringed. See **Munyuki v City of Gweru 1998(1) ZLR 182 (S)**.*

PACPRINT (PRIVATE) LIMITED V KUMBULA & OTHERS SC 67/2017

- If you walk out of a hearing, you lose a right to challenge them either on procedure or merit. - ***Moyo v Rural Electrification Agency SC 4/14;***
- The inclusion of members of the workers' committee to the disciplinary committee panel is a right afforded to employees. The employer is not to blame if they do not come. The employee cannot seek nullification of proceedings on that basis but must insist that the workers' committee should form part of the disciplinary committees before proceeding.

ON THE PENALTY

- **CARNAUD METAL BOX V RUZVEZVE SC 56/2015 ; INNSCOR AFRICA V LETRON CHIMOTO SC 6/12**
 - Once the employer had taken a serious view of the act of misconduct committed by the employee to the extent that it considered it to be a repudiation of contract which it accepted by dismissing her from employment the question of a penalty less severe than dismissal being available for consideration would not arise unless it was established that the employer acted unreasonably in having a serious view of the offence committed by the employee
- What should Disciplinary Committees do?

ON INTERNAL APPEALS

- **ZESA Holdings P/L v Matunja SC 73/22 & Pioneer Transport v Mafikeni SC 65/2018** – employer has a right to appeal against a decision of the disciplinary committee.

ON FAILING TO CONCLUDE HEARING WITHIN STIPULATED TIME

- - **Mombeshora v Institute Of Administration And Commerce (Zimbabwe) SC 72/2017** – in **Nhari v Zimbabwe Allied Banking Group SC-51-13**, employer's failure to act within a prescribed time limit gives employee a right to demand a hearing in time or seek a mandamus and not to nullify such proceedings or stop them from ever being held.
- The employee has a right to utilize section 101(6) or to seek a mandamus.
- Mere delay does not invalidate the proceedings.

MINUTES OF HEARING

- *UNIFREIGHT LIMITED v MADEMBO SC 6/2018* - there was no dispute on the blatant disregard of provisions of the code which are binding on both parties. No proper and accurate minutes were taken; chairman doubled up as complainant, there were no representatives from employee trade union. These had caused employee prejudice. This is an apt case where irregularities can vitiate proceedings as was set in *Nyahuma v Barclays Bank of Zimbabwe SC 67/05*

NEED FOR REASONS FOR VERDICT AND PENALTY

- **NYEMBA V CMED PRIVATE LIMITED SC 65/2015** – failure to give reasons is a misdirection as it is difficult to justify the decision and cannot discount arbitrariness.
- However, reasons need not be like a written judgment of a court. As long as there is a consideration of both parties' evidence and reasons for the rejection of one version in preference to the other, it suffices regardless of its terseness

ON EFFECT OF REINSTATEMENT ORDER **FOLLOWING SUCCESSFUL REVIEW**

- **ZUPCO V MASHINGE SC 21/21** - *that the broader and more readily acceptable position in my view is that the status quo ante of the parties that is restored upon the setting aside of the irregular employment disciplinary proceedings also relates substantively to the contractual status of the parties. Put simply, it must be understood to mean broadly that upon the setting aside of fatally defective disciplinary proceedings, the employment contract is restored, without necessarily or by implication negating the remedies and procedures available to each of the parties to terminate the contract in terms of the agreed terms.*

THANK YOU ALL

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