REPORTABLE (88)

TERERAI LOUIS MUTASA
v
ZESA ENTERPRISES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MATHONSI JA, KUDYA JA & MUSAKWA JA
HARARE: 23 JULY 2024 & 19 SEPTEMBER 2024

B. Magogo, for the appellant.

N. M. Phiri with *C. J. Mahara* for the respondent

MATHONSI JA: This is an appeal against the whole judgment of the Labour Court ('the court *a quo*') sitting at Harare handed down on 30 July 2021 dismissing the appellant's appeal against the decision of the disciplinary authority which found him guilty of two counts of misconduct and dismissed him from employment.

THE FACTS

The salient facts are accurately captured in the appellant's heads of argument. Briefly they are that after the respondent advertised for the position of Managing Director on 14 December 2009 and following successful interviews, the appellant was appointed to that position on 3 May 2010. After serving as Managing Director of the respondent for some time, the appellant was placed on indefinite leave by letter dated 23 April 2013 written by the Group Chief Executive Officer. He wrote:

> "We refer to the above matter and advise that we request that you stop reporting for duty at the offices of ZESA Enterprises commencing on Wednesday 24th April 2013. There are issues that we intend to address relating to your contract of employment with us and it is

our view that these will be concluded by Friday 17th May 2013. We shall advise you once we have completed the exercise.

In the meantime, you shall be on your full salary and benefits during the said period."

Notwithstanding the contents of the above letter, the appellant remained on forced leave until 26 September 2013 when he was officially retrenched from employment. In recording that development, the Head of Corporate Services wrote:

"Subject: RETRENCHMENT

Reference is made to the notice from the Chairman- ZESA Enterprises as well as the subsequent retrenchment negotiations.

I can confirm that following the signing off of the retrenchment agreement, you are now officially retrenched from the company's employ.

I wish you the best in your future endeavours."

That way the appellant's initial employment by the respondent ended and he may have pursued other endeavors as entreated by the Head of Corporate Services. The respondent again advertised for the position of Managing Director and the appellant responded to the advertisement. Following successful interviews, the appellant was appointed the Managing Director of the respondent with effect from 14 February 2014. He was made to sign a four - year fixed term contract to run up to 28 February 2018.

It is common cause that on the expiration of the employment contract it was tacitly relocated for a further four-year period as there was a forensic audit which was taking place. An audit report was produced in January 2019 and it raised concerns leading to the appellant being charged. On 16 December 2019 nine counts of misconduct were preferred against him in terms of s 4 (a) of the Labor (National Employment Code of Conduct) Regulations, SI 15/2006, that is, acts of conduct or omission inconsistent with the fulfillment of the express or implied conditions of the employment contract.

Following a protracted disciplinary hearing, the disciplinary authority found the appellant guilty on only two of those counts. Firstly, he was found guilty of count one, that is, making an advance payment of US$ 9 500 000.00 to an Indian company known as PME Power Solutions (India) Limited, contrary to the terms and conditions of that company's contract with the respondent. The allegations in count one were that the contract provided for an advance payment of 60% of the contract sum but the appellant paid more than that in contravention of the financial control systems put in place by the respondent and in breach of s 45(b) and (c) of the Public Finance Management Act [*Chapter 22:19*] ('Public Finance Management Act'). Significantly, the payment was made on 10 June 2011 during the tenure of the appellant's initial employment contract terminated by retrenchment on 23 September 2013.

Secondly, the appellant was found guilty on count three, that is, authorization of donations of US$200.00 to Zimbabwe Republic Police Harare South District and US$100.00 to the Zimbabwe Republic Police Public Relations Program. It was alleged that the donations were in breach of s 45(c) of the Public Finance Management Act as they contravened the respondent's policy on donations. Following his conviction on those two counts and acquittal on the remaining seven counts, the appellant was dismissed from employment.

PROCEEDINGS BEFORE THE COURT *A QUO*

Aggrieved by the finding of the disciplinary authority, the appellant appealed to the court *a quo* on the following grounds:

"1. The disciplinary authority erred in dismissing the objection relating to the legal standing of the respondent's sole witness to represent the respondent in the absence of credible evidence as regards a resolution of the respondent's board to haul appellant for a disciplinary hearing.

2. The disciplinary authority erred in finding, contrary to evidence suggesting that PME had already made a delivery of material and commenced construction of substations, that appellant made an advance payment of US$ 9.5 million.
3. The authority erred in ignoring evidence led to the effect that the US$ 9.5 million payment was made in respect of five and not just two substations. A *fortiori*, the disciplinary authority misdirected itself in various ways to wit:
    a. In having regard to two impugned pro-forma invoices for Mufakose and Glen Norah without making a ruling on their authenticity and without verifying the fact of their existence at the time of payment.
    b. In disregarding abundant evidence that materials for the substations was being delivered simultaneously and the construction thereof happening contemporaneously.
    c. In disregarding evidence of the contemporaneous commissioning of the substations.
    d. In giving no due weight to the fact that there was no evidence of a pre-payment duly recorded in both 2011 financial statements and the relevant annual external audit report of the respondent's books.
    e. In failing to find, in keeping with the evidence tendered, that the respondent suffered no prejudice as a consequence of the payment of the US$ 9.5 million.
4. The disciplinary authority erred in failing to find, just as he did on the US$ 1000 sponsorship to the Zimbabwe Psychological Association that the employee had no hand in the authorization of the ZRP totaling US$ 300.
5. Even assuming without conceding that the employee authorized the said sponsorships and/ or donations, the disciplinary authority erred in failing to find that the said donations were envisaged in the organization's newly crafted marketing policy.
6. As regards the penalty, the disciplinary authority paid lip service to the totality of the mitigatory circumstances raised by the appellant, *inter alia*, the insignificant amount donated to ZRP, not as a bribe but as corporate sponsorship support, the absence of

prejudice to the company as a consequence, the ZESA Holdings interventions and operating practice coupled with ministerial directives which the appellant had no power to override or ignore. In settling for dismissal, the disciplinary authority grossly misdirected itself in the exercise of discretion such that no reasonable tribunal could have arrived at such a decision."

THE APPELLANT'S CASE

At the inception of the hearing, the appellant abandoned the first ground of appeal. Through his counsel, the appellant submitted that the finding of the disciplinary authority that the payment of US$ 9.5 million was an advance payment was a gross misdirection because the respondent signed five similarly worded contracts with PME. At the time the payment of US$ 9.5 million was made, so it was argued, PME had delivered goods worth in excess of US$ 22 million. It was therefore contended that the US$ 9.5 million could not have been an advance payment but instead amounted to payment of arrears due to PME.

Counsel further submitted that the US$ 9.5 million was made in respect of two of the five substations and not one as alleged. He rounded off by submitting that the payments were made in line with the provisions of the Public Finance Management Act.

In relation to the donations, counsel argued that the appellant is not the one who effected payments of the donations and that in any event, the amounts of those donations were negligible. He also averred that such amounts related to petty cash, which the appellant sanctioned, and were termed as 'marketing expenditure'. In the appellant's view, this was justifiable expenditure beneficial to the respondent.

Regarding the penalty of dismissal imposed by the Disciplinary Authority, it was submitted that there was a gross misdirection in the exercise of discretion given that the respondent had known about the payments for years and taken no disciplinary action against the appellant. Apart from that, so it was argued, the sum of US$ 9.5 million was money owed by the respondent to PME which it was obliged to pay anyway. Its payment did not prejudice the respondent at all and as such, dismissal was uncalled for especially as the payment was made, on the instructions of Mr Chifamba, the Group Chief Executive Officer ('CEO'), following authorization by the respondent's board.

THE RESPONDENT'S CASE

Per contra, through its legal counsel, the respondent contended that the appellant's misconduct arose from the irregular payment which he made contrary to the provisions of s 45 of the Public Finance Management Act and his contractual obligations. The respondent's case was that, the payment terms of the contracts with PME, were that only 60% of the contract price was to be paid in advance but the appellant paid more than that. The respondent downplayed the issue of the delivery of material worth US$ 22 million as irrelevant in light of the fact that the contract with PME was not only for the supply of materials but also for design, supply, construction and commissioning of the substations. Therefore, the respondent contended, the obligation to make an advance payment could not be linked to the supply of the materials considering that the contract with PME went beyond the supply of materials.

The respondent also contended that, the instruction from Mr Chifamba for the appellant to utilize the CBZ Bank facility did not assist the appellant as the instruction made no reference to the contractual terms and did not specify a figure. It was also argued that even though there was no prejudice to the respondent, the appellant made an irregular payment

which was not in terms of the contract with PME and thus the appellant failed to act in terms of s 45 of the Public Finance Management Act. In the respondent's view, it was immaterial that PME was owed money.

With regard to the charge relating to donations, the respondent submitted that such were outside the provisions of the administration note issued by the respondent and that the appellant admitted having approved the donations. Accordingly, the respondent strongly defended the determination of the disciplinary authority which found the appellant guilty and dismissed him from employment.

THE COURT *A QUO'S* DETERMINATION

The court *a quo* found that it was common cause that the amount of USD$9.5 was paid to PME on 10 June 2011. It found that the payment of US$ 9.5 million to PME was not 60% and that counsel for the appellant conceded to the same fact. It found that there was no instruction from the Group CEO that an amount of US$ 9.5 million should be paid and that the respondent owed PME US$ 18 million and US$ 12 million was available as a loan facility from CBZ Bank. However, the appellant chose to pay US$ 9.5 million for reasons best known to him. Accordingly, the court *a quo* held that there was no immediate instruction to pay US$ 9.5 million.

The court *a quo* further found that the appellant confessed to the auditors that his conduct of paying US$ 9.5 million was in contravention of the terms of the contract between the respondent and PME. The court *a quo* disregarded the appellant's submission that it was a coincidence that the date of payment of the amount in question tallied with the invoices from PME in relation to the Glen Norah and Mufakose substations only.

Pertaining to donations, the court *a quo* found that the appellant changed his statement as he sought to be exonerated from authorizing the donations yet he had argued before the tribunal that the donations were justified. The court found his change of positions as an attempt to get away with the mismanagement of funds. The court *a quo* also found no misdirection on the part of the disciplinary authority in imposing the penalty of dismissal against the appellant and accordingly dismissed the appeal for lack of merit.

PROCEEDINGS BEFORE THIS COURT

Still disgruntled with the outcome in the court *a quo,* the appellant filed the present appeal on the following grounds:

"GROUNDS OF APPEAL

1. The court *a quo* grossly erred and seriously misdirected itself in upholding the finding that appellant had made an advance payment even against contrary evidence showing that payment was in respect of all substations following upon contemporaneous delivery of materials and construction of all substations.
2. The court *a quo* erred and seriously misdirected itself in determining the matter before it on the basis of counsel's concessions which had no bearing on the dispositive issues, to wit, whether appellant had made an advance payment and whether payment had been on the strength of two *pro forma* invoices as opposed to actual commercial invoices.
3. The court *a quo* erred and misdirected itself in upholding the conviction on donations in the absence of the evidence that the appellant had personally authorized same and while ignoring the fact that these sponsorships were allowable discretionary petty-cash payments in furtherance of the marketing thrust.

4. The court erred in failing to utilize its powers in terms of s 12B(4) of the Labour Act to seriously consider appellant's cogent mitigatory factors bearing on *inter alia* the absence of prejudice coupled with presence of board approval for PME payment and the insignificance of the donation to ZRP as having the effect of lessening his penalty."

At the commencement of the hearing of this appeal, Mr *Magogo* for the appellant applied to amend the appellant's grounds of appeal by the addition of the following ground as ground number 1:

"1. The court *a quo* erred in upholding appellant's conviction relating to the US$ 9.5 million payment to PME even though the respondent had lost the right to discipline him on the same when it retrenched him in 2013."

After engagement with the court, Mr *Phiri* for the respondent consented to the proposed amendment which was then granted by consent. The appeal was then heard in terms of the above grounds of appeal as amended by the insertion of the new ground as number 1 and the original four grounds as numbers 2, 3, 4 and 5.

The issues for determination in this appeal are narrow. They are whether the respondent was entitled to discipline the appellant for conduct which occurred during the subsistence of an employment contract already terminated by retrenchment. If it was, whether the appellant committed an act of misconduct for which he could be dismissed from employment.

In respect of ground 1, Mr *Magogo* submitted that it raises a point of law which can competently be raised for the first time on appeal especially in light of the fact that it is dispositive of the part of the appeal relating to the charge arising from the payment of US$ 9.5 million to PME. In counsel's view, the issue to be decided in that regard is whether, in the circumstances of the matter, the appellant could be disciplined for an alleged misconduct which

occurred during the subsistence of an employment contract which was terminated by retrenchment before a new employment contract was entered into several months later.

Mr *Magogo* submitted that the appellant was in the employ of the respondent on two different epochs. The first ran from May 2010 to April 2013. This first contract came to an end when the appellant was retrenched which retrenchment was recorded in the letter of 26 September 2013 quoted earlier in this judgment. It was submitted further that the appellant was unemployed during the period extending from April 2013 to February 2014. The second employment contract came into effect when the appellant was re-hired in February 2014 in terms of a four- year fixed-term contract.

Mr *Magogo* strongly argued that the employer's right to discipline the employee in respect of acts or omissions which occurred during the tenure of the first employment contract "died" with the termination of that contract by retrenchment in April 2013. The employer could not, so it was argued, retain the right to discipline the employee during the tenure of the second employment contract for what occurred during a contract which was no longer in existence.

Counsel sought to distinguish the case of *Muchechetere* v *Zimbabwe Broadcasting Corporation (Pvt) Ltd & Ors* SC 143/21 where this Court determined that an employer retains the right to discipline an employee for misconduct which occurred during an earlier contract of employment if the earlier contract is renewed and there is continued employment from the first to the second contract.

It was argued on behalf of the appellant that his situation is different from that of *Muchechetere* in that there was no continuity in his employment. In fact, so it was argued, while *Muchechetere* was an employee of the Zimbabwe Broadcasting Corporation in terms of

the old contract until midnight of the last day of the contract, he woke up the following day still an employee in terms of the new contract, there was no continuity in the appellant's employment. The first contract was terminated, a retrenchment package was paid to him and he was unemployed for about nine months before a new contract was signed.

On the merits of the appeal relating to the payment of US$ 9.5 million, Mr *Magogo* maintained the arguments made *a quo* which I have related to above. Nothing will be achieved by repeating them here.

Regarding the conviction of the appellant on the charge involving the donations totaling US$300.00 made to the Zimbabwe Republic Police, Mr *Magogo* drew attention, first and foremost, to the fact that the original allegations included donations made to a number of institutions including the ZANU PF political party to which the respondent made a donation of US$ 10 000.00 for its 14th Annual People's Congress, victory celebrations of a Deputy Minister, to which a donation of US$ 525.00 was made, the 21st February Movement which received US$ 2000.00, Musha Mukadzi Armed Forces Foundation which received US$ 3 000.00 and the Zimbabwe Psychological Association which received US$ 1000.00 from the respondent.

It was submitted that the Disciplinary Authority having exonerated the appellant for the donations made to the other recipients in similar circumstances, it ought to have done the same for the negligible donations made to the Police. This was particularly so, it was argued, considering that it is not the appellant who personally made the donations and neither was he aware of them, it being common cause that he only approved the petty cash requisitions which divisional heads would use based on their authorization limits. In the case of the Police donations, it was the Human Resources Manager who made them.

On the penalty of dismissal, it was submitted that the court *a quo* should have interfered with it because there was an improper exercise of discretion. Mr *Magogo* made the point that the totality of the circumstances of the case militated against dismissal regard being had that the appellant did not derive benefit at all, the respondent was not prejudiced at all and the continuance of an employer-employee relationship was demonstrably unaffected.

This was so because even though the respondent's Board was well aware of the payment made to PME in June 2010, it still reposed trust and confidence in the appellant by re-engaging him as Managing Director in February 2014. In respect of the donations, it was argued on behalf of the appellant that his job description gave him the marketing mandate and there were obvious benefits to be derived by the respondent from its association with the Police. For these reasons, counsel took the view that a written warning would have met the justice of the case even if the conviction on the count involving the payment of US$ 9.5 million stood.

Per contra, Mr *Phiri* for the respondent submitted that the termination of the appellant's initial employment contract by retrenchment did not take away the respondent's right to discipline him for the misconduct which arose during the tenure of the terminated contract. Counsel submitted, relying on the authority of *Muchechetere*, *supra*, that there is nothing wrong with charging an employee for such misconduct if, at the time the charge is preferred, he is still an employee of the same employer.

In counsel's view, the present case cannot be distinguished from the *Muchechetere* case because, in both cases there was termination of the prior employment contract. In both cases, so it was stated, a new contract was entered into on the same terms and conditions as the terminated one.

On the payment of US$ 9.5 million to PME, Mr *Phiri* submitted that the payment was irregular. If it was, as the accounting officer the appellant should face the consequences of the irregular payment given that he had a duty to ensure that there was no irregular expenditure. It was further submitted that once it was established that the payment was made in contravention of the contract between the respondent and PME which required a down payment of 60% of its value to be made, it followed that prejudice was caused to the respondent.

Mr *Phiri* submitted that the donations to the Police were authorized by the appellant and constituted irregular expenditure as they were in direct contravention of the Administrative Policy of the respondent. According to him, it was immaterial that the amounts involved were negligible. He urged the court not to interfere with the penalty of dismissal because it was arrived at in the exercise of the employer's sentencing discretion, the appellant having failed to establish a basis for interference.

THE LAW

There is need, at the outset, to clarify the implications of the period of the fixed-term contract which ran from February 2014 to February 2018 as against the disciplinary proceedings which were conducted after that period. The appellant continued in employment after the contract had run its course. It is settled law that a fixed-term contract of employment automatically expires at the end of the specified period unless the parties thereto mutually agree to its renewal or continuation. (See *ZIMRA* v *Mudzimuwaona* SC 4/18). In certain instances, however, despite the expiry of the period of employment, the employer-employee relationship may continue to exist owing to the parties' conduct under the concept of tacit relocation.

What tacit relocation, as it applies to contracts of employment, entails has been explained in the case of *Gumbo* v *Air Zimbabwe (Pvt) Ltd* 2000 (2) ZLR 126 at 130 A-D wherein the court made the following pertinent remarks regarding the principle:

> "Finally, the best that can be said for the applicant is that in certain cases akin to the present there is a presumption that when the parties continue the employer-employee relationship beyond the contractual period without agreeing new terms there is a tacit relocation of the expired contract on the same terms and for the same duration. In other words, all things being equal, it could be said that on 1 October 1999, the applicant commenced a new probationary period. However, this presumption does not operate when it is clear that one of the parties has no intention of continuing on the terms of the expired contract. See *Lilford* v *Black* 1943 SR 46 at 47, where BLAKEWAY J said:
>
> > 'The renewal of a lease or of a contract for services to be performed can take place either by express agreement or tacitly. If, after the expiration of the period provided for the duration of the contract, the parties continue their relationship without any fresh agreement the law presumes, in the absence of indications to the contrary, that they have agreed to enter upon a new lease on the same terms as the expired lease. But this presumption does not operate when it is clear that the parties or one of them does not intend to carry on with the contract on the old terms.'" (Emphasis added)

Tacit relocation was further explained in *Tobacco Processors Zimbabwe (Private) Limited* v *Mutasa & Ors* SC 12/21 at p 10, wherein it was stated as follows:

> "The principle that can be drawn from the cited authorities is that an inference of tacit relocation is dependent upon the continued existence of an employer-employee relationship after the expiration of the contract. The employee will continue rendering his services to the employer who in turn pays remuneration in terms of the expired contract."

The appellant was charged and found guilty of contravening s 45 (b) and (c) of the Public Finance Act which reads as follows:

> "45 Responsibilities of employees of public entities
> An employee of a public entity shall to the extent that it is competent for the employee to do so -
> (a) ensure that the system of financial management and internal control established for that public entity is implemented;
> (b) be responsible for the effective, efficient, economical and transparent use of the financial and other resources of the public entity;
> (c) take effective and appropriate steps to prevent any irregular expenditure and fruitless and wasteful expenditure and any under-collection of revenue due;

(d) comply with those provisions of this Act applicable to the public entity;
(e) be responsible for the management, including the safeguarding, of the assets of the public entity and the management of its liabilities."

Unpacking the law applicable to this appeal further, it should be observed that the appellant was charged under s 4(a) of the National Code, SI 15/06 which, in its introduction provides:

> "An employee commits a serious misconduct if he or she commits any of the following offences:
> (a) any act of conduct or omission inconsistent with the fulfilment of the express or implied conditions of his or her contract; or
> (b) …."

It is imperative to read the section together with the operative part of s 6 of the Code which reads;

> "6(1) Where an employer has good cause to believe that an employee has committed a misconduct mentioned in s 4, the employer may suspend such employee with or without pay and benefits and shall forthwith serve the employee with a letter of suspension with reasons and grounds of suspension."

It is the foregoing provisions which entitle an employer to discipline an employee. They allow an employer to terminate an existing employment contract owing to serious breach by the employee committed during the existence of such contract.

Generally speaking, dismissal means that an employer has terminated a contract of employment with or without notice. The most common reasons for dismissal are misconduct, inability to do the job and redundancy. Retrenchment can therefore be classified as a form of dismissal from employment with notice at the behest of the employer.

According to *Conventus Law*, "7 Things You Should Know About Retrenchment In Malaysia," December 19, 2016:

> "Retrenchment is a form of dismissal that is justified on the basis that the roles of the employees concerned have become redundant … Put in another way, redundancy is a situation where the employee or position is no longer required. Retrenchment is the action taken to terminate the employment relationship in the event of redundancy."

This Court has had occasion to pronounce itself on the right of an employer to discipline an employee for misconduct committed during the tenure of an expired employment contract which is immediately renewed after its expiry in the case of *Muchechetere* v *Zimbabwe Broadcasting Corporation & Ors*, *supra*.

The brief facts of that case were that the employee was employed as the employer's Chief Executive Officer between 2009 and 2013 when its Board was dissolved. He had been employed on a contractual basis with a subsisting contract having been renewed in May 2011. After being placed on leave with pay on 14 November 2013, he was informed of allegations of misconduct unearthed by an audit. At the disciplinary hearing the employee argued that it was incompetent to charge him on allegations flowing from an expired employment contract. The employer's case was that the parties had been engaged in a continuous employment relationship highlighted by the renewal of the contract in May 2011.

The disciplinary committee found the employee guilty on some of the charges preferred against him. His review application to the Labour Court was dismissed on the basis that the misconduct occurred during the subsistence of the parties' employment relationship and that he failed to disprove the claim of a continuous employment relationship during the period 2009 to 2013.

On appeal to this Court, one of the grounds for attack was that the Labour Court erred and misdirected itself in law in holding that under SI 15/06, the employee could be charged with and convicted of acts of misconduct arising from an expired contract. The court cited with approval the Lesotho case of *Limkokwing University of Creative Technology Lesotho (Pty) Ltd* v *Mosia Nkoko & Anor* LC/REW 58/12, which determined that the renewal of an employee's contract meant that the employment had become continuous and as such, he could be charged with acts of misconduct committed during the currency of his expired fixed-term contract.

At paras 25, 26 and 28 GWAUNZA DCJ remarked:

"[25] The court is not persuaded that the interpretation ascribed to these provisions (s 4 and 6 of SI 15/06) by the appellant is correct. The appellant was an employee of the first respondent in terms of the old contract up to midnight of the last day of the contract. In other words, he literally went to bed as first respondent's employee and woke up still its employee on essentially the same terms of employment, *albeit* under the terms of a new contract. He proceeded to report for work as usual, and to carry out his duties. It has not been averred that he picked up any terminal benefits attendant on the expiry of the old employment contract. Thus, notwithstanding the technicality concerning the dates of expiry and renewal of the contracts in question, the employment relationship continued. It is to be noted that this employment relationship started in 2009. The court *a quo* pertinently observed that the appellant had not advanced any evidence to prove that for the period 2009 and 2013, he was not in a continuous employment relationship with the first respondent.

[26] Against this background, to then suggest, as the appellant does, that 'employee' for purposes of ss 4 and 6 of SI 15/06 refers only to one who both commits and is charged with the misconduct in question, during the currency of a subsisting contract and not a previous one is to advocate for an absurdity…..

[27] …..

[28] A contract of employment renewed immediately after an expired one, normally is indicative of the trust and confidence that the employer has in the employee's ability and competence in the performance of his/her work. By no stretch of the imagination should the renewal of the contract be seen as a means to wipe away any acts of misconduct committed by the same employee during the currency of the previous contract or contracts where such acts only come to light after the expiry and renewal of the old and new contracts respectively……" (The underlining is for emphasis)

Having said that, the court concluded that the employee fell squarely into the category of employees referenced in ss 4 and 6 of SI 15/06 notwithstanding that the acts of misconduct complained of were committed during the currency of the expired contract. In so

doing, the court was swayed by the continuity of the employment relationship as, at no time had the employee ceased to be such employee.

EXAMINATION

Whether the appellant could be charged for misconduct allegedly committed during the currency of a terminated contract

What is common cause is that the appellant's first employment contract came to an end when he was retrenched and a retrenchment agreement signed in 2013. It is also common cause that the misconduct arising from the payment of US$ 9.5 million occurred during the currency of the terminated contract given that the payment was made on 10 June 2011. In terms of s 4 (a) of SI 15/06 an employee commits a serious misconduct if he or she does any act of conduct or omission inconsistent with the fulfilment of the express or implied conditions of the employment contract.

In terms of s (6) (1) of the Code, an employer who has cause to believe that an employee has committed such misconduct is entitled to commence disciplinary proceedings by the suspension of such employee. The purpose of those proceedings would be to dismiss the employee from employment if found guilty of the misconduct complained of. Put in another way, the whole essence of disciplinary proceedings is to terminate an existing contract of employment. The discussion on the applicable law above has shown that dismissal means that the employer has terminated a contract of employment with notice.

The exercise undertaken by the respondent in 2013 in terms of which a retrenchment agreement was signed, the appellant was notified of his retrenchment and paid a retrenchment package resulted in the complete dismissal of the appellant and/or the termination

of what was then an existing contract of employment. The lid was closed on that chapter together with all that it entailed.

After that process, the respondent advertised for the position of Managing Director, thereby commencing a fresh process of a new employment contract which resulted in the appellant's new appointment. A new employment regime commenced with the signing of a contract in February 2014 during whose currency there was no misconduct of a payment of US$ 9. 5 million to PME.

Rocket science is not required to show that this new contract could not be lawfully terminated without proof of an act of misconduct and certainly it could not be terminated for a misconduct which occurred during the currency of an employment contract from which the appellant had long been dismissed.

I agree with Mr *Magogo* for the appellant that the case of *Muchechetere* v *Zimbabwe Broadcasting Corporation & Ors*, *supra*, is clearly distinguishable from the present case. In that case what swayed the court was the continuance of the employment relationship between the parties, the contract having expired and renewed immediately. What was also relevant in the determination of the matter was the absence of evidence of termination of the employment relationship and, more importantly, the fact that no terminal benefits were paid to the employee who never stopped reporting for duty.

In *casu*, there was a termination of the employment relationship, complete with the payment of a retrenchment package. The parties thereafter went their separate ways before a fresh recruitment process commenced which resulted in a new employment relationship. Logic

and common- sense dictate that the employer could not be allowed to uncover what was buried with the first contract and seek to rely on it to terminate the second employment contract during the existence of which no misconduct occurred.

I conclude therefore that the employer lost the right to discipline the employee for any misconduct arising from the payment of the US$ 9. 5 million on 10 June 2011, when it elected to dismiss the employee from employment by retrenchment and not for the alleged misconduct. The first ground of appeal has merit and is upheld. That finding is dispositive of the part of the appeal dealing with the issue of the US$ 9. 5 million paid to PME. It renders it unnecessary to examine the merits of that charge.

Whether the appellant could be dismissed for the donations made to the Police

Earlier on I mentioned that the allegations against the appellant included five other donations which, incidentally were each far more than the US$ 300.00 given to the Police. In respect of this charge, the disciplinary authority found him guilty because it took the view that he breached the duty of trust between him and the respondent as the donations did not further the respondent's marketing interests and the appellant was changing goalposts in his defense.

The court *a quo* upheld the disciplinary authority's findings in that regard. It reiterated that the appellant changed his statement having initially sought to be exonerated from authorizing the donations and then seeking to argue that the donations were justified. In finding the appellant not guilty in respect of the donation made to Musha Mukadzi, the disciplinary authority reasoned:

> "19. Clearly Musha Mukadzi is a charitable organization if one considers its letter requesting donations. The employer would be correct in its conclusion, but the issue does not end there. I do not agree with the employee that the donation would be covered under the Education head therefore it would be exempted. However, one should not put a blind

> eye and ignore the participation of the Holding Company…. collecting funds and forwarding to Musha Mukadzi. It is my considered view that the employee simply complied with a standing practice which ideally falls within clause 2 of the Administrative Note as the Group's consent was ultimately sought. There is no fault that can be attributed to the employee here. The employee at the end of the day was not the one who made the payment to Musha Mukadzi as alleged by the employer…." (The underlining is for emphasis)

The disciplinary authority went on to find the appellant not guilty in respect of the donation of US$ 1000.00 made to the Psychological Association even though it had found that the launch of the association did not fall under the exemptions set out in the Administrative Note for which donations could be made. The basis for doing so was that the request for the donations was addressed to the Human Resources Manager "who processed this request." It concluded that:

> "The employer did not establish the employee's hand in this sponsorship. I cannot find him to be in the wrong."

When it came to the donations made to the Police the disciplinary authority did not apply the same yard-stick. It simply determined the issue on the basis that the donations were not exempted by the Administrative Note and that the relationship with the Police did not enhance the company's image and did not increase its visibility. Therein lies the misdirection.

The disciplinary authority totally ignored the fact that the appellant did not have a hand in the payment of the donations made to the Police. In fact, it is common cause that it is the Human Resources Manager who made the donations as in the case of the Psychological Association. In my view, the same principle should have been applied to the donations made to the Police. The appellant only approved the petty cash from which donations were made and did not have a hand in the payments. He should have been found not guilty in that regard as well.

The court *a quo* should have interfered with the conviction involving the donations made to the Police. The third ground of appeal also has merit and is upheld.

DISPOSITION

While an employer has a right to discipline an employee for misconduct which occurred during the currency of an expired employment contract in situations where the expired contract is renewed immediately, where the employment contract is terminated by dismissal or retrenchment, the employer has no similar right to discipline the employee for misconduct which occurred during the lifespan of an already terminated contract. The misconduct in question would have died with the terminated contract.

The liability of an employee under s 45 (c) of the Public Finance Management Act is personal and attaches to the employee concerned. The employee is judged for the steps he or she personally takes which results in the irregular expenditure. Where the payment is made by a particular employee, generally it is that employee who is answerable for it and not any other person.

Regarding costs, there is no reason why they should not follow the result in the usual way.

In the result, it be and is hereby ordered as follows:

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

"1. The appeal is allowed with costs;

2. The determination of the Disciplinary Authority is set aside and substituted with the following:

(a) The appellant is found not guilty and acquitted of all the charges of misconduct.

(b) The appellant is reinstated with no loss of salary and benefits with effect from the date of dismissal.

(c) If reinstatement is no longer possible, the appellant shall be paid damages *in lieu* of reinstatement to be agreed or quantified by the court."

KUDYA JA : I agree

MUSAKWA JA : I agree

Messrs Makuwaza & Gwamanda Attorneys, appellant's legal practitioners

Messrs Muvingi & Mugadza, respondent's legal practitioners