

REPORTABLE (16)

MARTIN MATENHERE
v
CORNWAY COLLEGE

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, CHATUKUTA JA & MWAYERA JA
HARARE, 16 OCTOBER 2023 & 22 FEBRUARY 2024**

B. Magogo, for the appellant

F. Chinwawadzimba, for the respondent

MWAYERA JA: This is an appeal against the whole judgment of the Labour Court (the court *a quo*) handed down on 9 March 2023. The court *a quo* dismissed the appellant’s appeal against the decision of the Disciplinary Hearing Authority which dismissed him from employment.

FACTUAL BACKGROUND

The appellant is a former employee of the respondent, having been employed as a school headmaster on 28 February 2020. The respondent is a private school in Harare. The appellant was charged with misconduct as defined in s 4 (a) of the Labour (National Employment Code of Conduct) Regulations S.I. 15 of 2006 (“the Labour Regulations”). Section 4 (a) of the Labour Regulations states that:

“An employee commits a serious misconduct if he or she commits any act or conduct or omission inconsistent with the fulfilment of the express or implied conditions of his or her contract.”

The appellant was suspended from work without pay and benefits on 4 June 2022 pending the investigations and disciplinary hearing into the allegations that he had fraudulently allowed a named student from Sandringham High School, to attend classes without paying any tuition fees to the school without informing the respondent.

He was summarily dismissed on 22 June 2022, which dismissal he successfully challenged. An order of reinstatement to his position without loss of salary and benefits was made on 1 July 2022. He however, the appellant was not physically reinstated as he had already been replaced by the appointment of another headmaster. He was further not paid the June salary.

On 7 July 2022, the appellant demanded his June salary. The respondent, in turn, replied, on 8 July 2022, by serving him with a charge letter and notice to attend a disciplinary hearing.

The disciplinary hearing was conducted on 22 July 2022. At the hearing the appellant raised the following four preliminary issues:

1. That the proceedings were predetermined and should be quashed because the initial summary dismissal was made after the appointment of a new headmaster.
2. That no reinstatement was done as the respondent purported to reinstate him on 1 July 2022 before suspending him on 4 July 2022. .
3. That no salary and/or benefits were paid for the month of June 2022, and,
4. That a new headmaster was appointed before he was suspended on 4 July 2022.

The disciplinary authority dismissed the preliminary objections. The appellant raised another objection that the disciplinary authority did not have jurisdiction to make a

determination. He argued that a period of 30 days had lapsed after notification of the hearing and the disciplinary authority had not determined the matter within the requisite period. He further argued that he had, on 2 September 2022, referred the matter to a labour officer for conciliation and once the matter had been referred to the labour officer, the disciplinary authority ceased to have jurisdiction to proceed to render its decision. The disciplinary authority however dismissed the objection holding that it was not required to make a determination within the 30 days period.

On the merits the disciplinary authority found that the appellant, as the headmaster and administrator of the school, allowed a student who was not enrolled with the school and who had not paid tuition fees to attend classes without informing the responsible authority. The disciplinary authority, despite efforts by the appellant to refer the matter for conciliation, found the appellant guilty of misconduct and dismissed him on 16 December 2022. Aggrieved by the decision of the disciplinary authority, the appellant appealed to the court *a quo* in terms of s 92D of the Labour Act [*Chapter 28:01*].

PROCEEDINGS BEFORE THE COURT A QUO

The appellant noted an appeal coupled with a review against both the determination and penalty handed down by the disciplinary authority. The grounds for review were to the effect that the disciplinary authority had no jurisdiction and that there was a gross irregularity in the proceedings and decisions made by the disciplinary authority. The application for review was struck off the roll on account of the applicant having used an irregular form. The court *a quo* then entertained the appeal. The appellant appealed on the grounds that the disciplinary authority erred and misdirected itself at law in finding the appellant guilty of fraudulently allowing an external student to attend classes at the school

without paying school fees when there was no evidence on a balance of probabilities to sustain a guilty verdict.

The appellant further averred that the disciplinary authority erred in dismissing the preliminary point that the proceedings were predetermined and that the penalty imposed was unreasonably harsh in the circumstances. The court *a quo* held that sufficient evidence was placed before the disciplinary authority to prove that the appellant allowed a student who had not paid tuition fees to attend lessons. It further held that the appointment of a new headmaster was not evidence of predetermination of the matter. The smooth running of the school had to continue.

As regards the penalty of dismissal, the court *a quo* held that the employer took a serious view of the appellant's misconduct and considered a dismissal as the appropriate penalty. It further held that the penalty was within the discretion of the employer and that there was no basis for interfering with the exercise of the employer's discretion.

The appellant did not secure fees from the student in question, due to the employer and according to the court *a quo* that was serious misconduct warranting the penalty of dismissal. The court *a quo* thus dismissed the appeal.

The appellant, dissatisfied with the judgment of the court *a quo*, noted the present appeal with this Court on the following grounds of appeal.

GROUND OF APPEAL

1. The court *a quo* grossly erred in upholding disciplinary proceedings held against the appellant after the respondent had already substantively engaged another person to

replace him in his position as the headmaster and in circumstances where the respondent had already predetermined the matter.

2. The court *a quo* grossly misdirected itself in upholding the finding that the appellant fraudulently allowed a non-student to attend classes in the face of evidence that the appellant's statements to teachers did not relate to class attendances.
3. The court *a quo* grossly erred in effectively upholding the manifestly outrageous finding by the Disciplinary Authority that the student had been recorded in the class register when no such evidence was led before it.

SUBMISSIONS BEFORE THIS COURT

At the hearing of this appeal, Ms *Chinwawadzimba*, counsel for the respondent, raised two preliminary objections. The first objection was that the appellant was not properly before the court because he had not tendered security for the respondent's costs of the appeal. She contended that r 55 as read with r 64 of the Supreme Court Rules, 2018, as read with Practice Direction 1/2017, was applicable with equal force to appeals from the Labour Court.

On the second preliminary point, she argued that the appellant had no proper grounds of appeal as the grounds of appeal raised did not relate to any points of law. She argued that labour matters are only appealable on points of law and not factual findings made by the court *a quo*. She thus sought to have the matter struck off the roll.

In response Mr *Magogo*, counsel for the appellant submitted that r 55 (2) applies only when the noting of an appeal suspends the operation of an order of the court *a quo*. In this instance, counsel argued that the noting of an appeal against the Labour Court judgment

did not suspend the operation of the judgment. He thus contended that r 55 (2) was not applicable in the present case such that there was no basis for striking the matter off the roll.

In respect of the second point he submitted that the grounds of appeal pointed to a gross misdirection by the court *a quo*. Such gross misdirection would allow this Court to interfere with the findings of the court *a quo* because the factual findings were grossly unreasonable. He further submitted that the court *a quo* erred in upholding the decision of the disciplinary authority which had no jurisdiction to determine the matter.

He argued that the question of jurisdiction was a point of law which could be raised at any stage. In fact, he further submitted that the question of jurisdiction had been raised *a quo* in the review application which was struck off the roll. Counsel sought to amend the grounds of appeal to include the fact that the disciplinary authority lacked jurisdiction to determine the matter. He further submitted that there would be no prejudice occasioned to the respondent if the court related to the issue as it would only nullify proceedings before the court *a quo* and the disciplinary authority.

At the court's request both counsel addressed the court on the merits of the matter before the determination of the preliminary points. Mr *Magogo* averred that the proceedings before the court *a quo* were a nullity as the disciplinary authority had no jurisdiction to determine the matter after the lapse of the 30 day period stipulated in s 101 (6) as read with s 101 (3) (e) of the Labour Act [*Chapter 28:01*] and also after the referral of the matter for conciliation by the appellant. He contended that the disciplinary authority is a creature of statute which ought to abide by the provisions of the statute. He submitted that the proceedings before the court *a quo* were a nullity since they emanated from proceedings before the disciplinary authority which were also a nullity. He further submitted that there was no

evidence to show that the appellant fraudulently allowed a student to attend class without payment of tuition fees.

Ms *Chinwawadzimba*, on the merits, submitted that, the fact that the matter was referred to a labour officer did not take away the jurisdiction of the disciplinary authority in terms of s 101 of the Act. She submitted that s 106 was not peremptory as it does not state that the determination should be within 30 days. She contended that there was evidence to prove that the student was attending classes without payment of tuition fees.

ISSUES

The issues that call for determination in this matter are as follows:

1. Whether or not an appeal from the Labour Court to Supreme Court requires the appellant to tender security for costs.
2. Whether or not the grounds of appeal are fatally defective.
3. Whether or not the proceedings *a quo* were fatally defective for want of jurisdiction.

THE LAW

Rule 55 on security for costs is instructive, it reads:

“55 Security

- (1) If the judgement appealed from is carried into execution by direction of the court appealed from, security for the costs of appeal shall be as determined by the court and shall not be required under this rule.
- (2) Where the execution of a judgment is suspended pending an appeal and the respondent has not waived his or her right to security, the appellant shall, before lodging copies of the record with a registrar, enter into good and sufficient security for the respondent`s costs of appeal.

Provided that where the parties are unable to agree on the amount or nature of the security to be furnished---

- (i) The matter shall be determined by the registrar upon application by the appellant; and

- (ii) The registrar shall specify the period within which the security shall be furnished.
- (3) A judge may, on application at the cost of the appellant and for good cause shown, exempt the appellant wholly or in part from giving security under subrule (2).
- (4) No security for costs in terms of subrule (2) need be furnished by the Government of Zimbabwe or by a municipal or city council or by a town management board.
- (5) Subject to the proviso to sub rule (2), where an appellant is required by this rule to furnish security for the respondent`s costs of appeal, such security shall be furnished within one month of the date of filing of the notice of his or her appeal in terms of rule 37, or where applicable, within a period specified by the registrar in terms of the proviso to subrule (2).
- (6) If an appellant who is required to furnish security for the respondent`s costs of appeal fails to furnish such security within the period specified in subrule (5), the appeal shall be regarded as abandoned and shall be deemed to have been dismissed.”

It is apparent from a reading of r 55 (2) that where an appeal suspends the judgment appealed against, the payment of security for costs is a prerequisite before lodging the record of appeal. Rule 55 (4) exclusively excludes specified institutions from that obligation. Security for costs are paid to compensate the respondent who already has a judgment in his/her favour but has to go through an appeal for wasted costs in case the appellant loses the appeal.

Rule 55 (2) spells out that where the execution of a judgment is suspended pending appeal then the appellant shall pay good and sufficient security for the respondent`s costs of appeal before lodging copies of the record with the registrar.

Section 92 E of the Labour Act [*Chapter 28:01*] provides that:

“92 E Appeals to the Labour Court generally

- (1) An appeal in terms of this Act may address the merits of the determination or decision appealed against.

- (2) An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against.
- (3) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires.” (Underlining own emphasis)

This provision exclusively relates to appeals from tribunals or Disciplinary Authorities to the Labour Court whose decisions are not suspended by the noting of an appeal. The section does not relate to appeals to the Supreme Court from the Labour Court. The provision is not ambiguous. In the case of *CFI Retail (Pvt) v Manyika* SC 8/16 MALABA DCJ (as he then was) made the following pertinent remarks:-

“Section 92 E (2) only provides that the noting of an appeal to the Labour Court against a determination or decision does not have the effect of suspending the operation of the determination or decision appealed against

The purpose of the section is to provide for the effect of the noting of an appeal in terms of the Act on the enforcement of the determination or decision. The provision is the reversal of the common law principle that the noting of an appeal against a judgment or a decision of a tribunal or lower court suspends the execution of the judgment or decision pending the determination of an appeal. Section 92 E (2) does not impose an obligation on a party appealing against the determination or decision to act in terms of the determination or decision appealed against pending the determination of the appeal. In other words there is no provision requiring the appellant to first comply with the determination or decision appealed against in order to preserve the right to appeal.” (underlining emphasis)

Section 92 F of the Labour Act on the other hand deals with appeals against the decision of the Labour Court to the Supreme Court.

“92 F Appeals against decisions of Labour Court

- (1) An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court.
- (2) Any person wishing to appeal from any decision of the Labour Court on a question of law in terms of subsection (1) shall seek from the judge who made the decision or in his or her absence from any other judge leave to appeal that decision.
- (3) If the Judge refuses leave to appeal in terms of subsection (2) the party may seek leave from the Judge of the Supreme Court to appeal.”

A close look at this section reveals that s 92 F is silent on the issue of whether or not the noting of an appeal against the decision of the Labour Court to the Supreme Court suspends the judgment of that court unlike the wording of s 92 E which spells out that the noting of an appeal from tribunals to the Labour Court does not suspend the operation of the tribunal's determination. The fact that the Act does not specifically provide that the noting of an appeal against a decision of the Labour Court does not suspend the decision appealed against means that the common law applies. It is a principle of the common law that an appeal suspends the impugned decision.

There is no basis for treating appeals from the Labour Court to the Supreme Court differently from appeals from the High Court or the Administrative Court to the Supreme Court. The noting of an appeal to the Supreme Court from these courts suspends the operation of the judgment appealed against. The rules specify institutions exempt from paying security for costs. If appeals from the Labour Court to the Supreme Court were exempt from security for costs the rules would have spelt out the exemption as specified in r 55 (4) on the Government of Zimbabwe or by a municipal or by city council or by a management town board. It can be deduced therefore, that to the extent that an appeal against a judgment of the Labour Court to this Court suspends the judgment in question, the provisions of r 55 (2) applies. The appellant is required to enter into good and sufficient security for the respondent's costs.

The fact that the rules are silent on appeals from the Labour Court means that the appellants ought to tender security for the respondent's costs. Rule 64 of the Supreme Court Rules is instructive. It provides as follows:

“64 casus omissus

In the event of any casus omissus in this part, the provisions of Part VI shall apply mutatis mutandis.”

The purpose of security for costs was aptly and clearly pronounced by MATHONSI JA in *Watermount Estates (Pvt) Limited & Anor v The Registrar of the Supreme Court & Ors* SC 135/21. In that case this Court emphasized that rule 55 (2) required that the appellant pays security for costs. The judge made pertinent remarks at p 13 of the judgement when he stated as follows:

“Significantly the 2018 rules not only require that the appellant enters into good and sufficient security (r 55 (2)), they also require the appellant to do so within one month of filing the notice (r 55(5)) and provide the sanction that if it is not done the appeal shall be deemed to have been abandoned (r 55 (6))”

APPLICATION OF THE LAW TO THE FACTS

It is trite that where the noting of an appeal suspends the operation of the judgment a party who notes an appeal has to pay security for costs within the prescribed time frame and not only make a pronouncement of intention to provide security for costs. An appeal from the Labour Court to the Supreme Court suspends the operation of the judgment just like appeals from the Administrative Court and the High Court. A reading of r 55 together with r 64 when related to the facts of the present case reveals that by not paying security for costs within the prescribed time the appellant contravened the rules of this Court. Rule 55 (6) ought to apply in the circumstances. It is clear from the wording of the rule that if an appellant who is required to furnish security for the respondent’s costs of the appeal, fails to furnish such security within the specified period the appeal shall be regarded as abandoned and shall be deemed to have been dismissed.

The appellant in this case did not comply with r 55 on security for costs. As such the appeal suffers the fate of having been deemed abandoned and dismissed. The point *in limine* on security of costs raised by the respondent is sustained. It is a preliminary point that is dispositive of the matter. To that extent therefore, it will not be necessary to consider the other preliminary points regarding the grounds of appeal not being on points of law and the

issue of jurisdiction sought to be introduced by the appellant's counsel in his request to amend the grounds of appeal. Since the issue of security for costs is dispositive of the matter, it will not be necessary to proceed to the merits as there is no valid appeal before the court.

DISPOSITION

Having made a finding that the appellants are not exempted from paying security for costs, which they did not pay, the appeal is deemed abandoned and dismissed by operation of law. It ought not to have been enrolled and as such it ought to be removed from the roll.

Costs follow the result. In this case we find no reason to depart from that standard.

Accordingly, it is ordered that:

1. The matter be and is hereby removed from the roll with costs.

GWAUNZA DCJ : I agree

CHATUKUTA JA : I agree

Ruzvidzo & Mahlangu Attorneys, appellant's legal practitioners

Nyakudanga Law Chambers, respondent's legal practitioners