

REPORTABLE (34)

THATHILE INVESTMENTS CASMYN MINING
v
THABANI NCUBE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, KUDYA JA & CHATUKUTA JA
BULAWAYO: 20 & 23 MARCH 2023

S. Siziba, for the appellant.

B. Mhandire, for the respondent.

CHATUKUTA JA

[1] This is an appeal against part of the judgment handed down by the Labour Court sitting at Bulawayo on 22 February 2022. The matter before the court *a quo* was an appeal noted against a purported appeal determined by a Designated Agent on the respondent's dismissal from employment.

At the hearing before this Court, the matter was struck off the roll by consent with no order as to costs with reasons to follow. These are they.

FACTUAL BACKGROUND

[2] The respondent was employed by the appellant from the year 2010 to October 2015. During his deployment in the appellant's geology department, allegations arose that he was involved in illicit dealings which included theft of gold and explosives. Instead of

investigating the matter and pressing charges against him, the appellant decided to transfer him to the department of works. The respondent refused to sign the transfer forms as he viewed an acceptance of the transfer as an admission of guilt.

- [3] Thereafter, the respondent sought to take a few days off from work in order to seek legal advice. He was duly advised by the appellant's Human Resources office that his application to take some days off could only be approved by the department to where he had been transferred. Nevertheless, the respondent elected to absent himself from work without leave. He was absent from the office for five days between 23 and 29 October 2015. Upon his return, the appellant, by letter dated 10 November 2015, dismissed him from employment. The dismissal was predicated on the respondent's absence without leave. Discontent with his dismissal, the respondent lodged an appeal to a Designated Agent. He asserted that the disciplinary process was a nullity for the reason that he was not called for a hearing in violation of this right to be heard. The Designated Agent held that the transfer of the respondent was unlawful. He accordingly ordered that the respondent be reinstated to his former position. He further ordered that the respondent be awarded damages for "the premature termination of his contract".

PROCEEDINGS BEFORE THE COURT *A QUO*

- [4] This triggered an appeal to the court *a quo* by the appellant against the ruling by the Designated Agent. The appellant argued firstly, that the Designated Agent lacked jurisdiction to hear an appeal against a completed internal disciplinary process. Secondly, that the Designated Agent went on a frolic of its own by determining an issue which had not been referred to him.

[5] Per *contra*, the respondent submitted that the Designated Agent properly determined the issues that were placed before him.

DETERMINATION BY THE COURT A QUO

[6] In its judgment, the court *a quo* held that the Designated Agent's ruling was lawful on the basis that the appellant's disciplinary proceedings were a nullity. At the tail end of its judgment, the court *a quo* stated as follows:

“Accordingly the appeal succeeds to the extent that the Designated Agent misdirected himself in making an award of damages without adducing evidence from the parties.”

[7] Dissatisfied by the decision of the court *a quo*, the appellant filed the instant appeal on a number of grounds.

SUBMISSIONS BEFORE THIS COURT

[8] At the hearing, the court inquired from the parties whether there was a valid appeal given the fact that the court *a quo* had not issued a substantive order at the end of its judgment and the appellant was instead appealing against the reasoning of that court.

[9] Both counsel conceded that the court *a quo* did not issue a substantive order and that the matter ought to be struck off the roll with no order as to costs.

APPLICATION OF THE LAW

[10] The concession by both counsel was in the court's view properly made. It is trite that an appeal lies against an order and not the reasons for granting the order. In *Chidyausiku v Nyakabambo* 1987 (2) ZLR 119 (SC) at 125 B-F it was held that:

In order to be valid, a notice of appeal must be directed to the whole or part of the order made by the court a quo and not to its reasons for making the order in question. It must be lodged against the substantive order. This much emerges plainly from the decision in *Western Johannesburg Rent Board & Anor v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) where at 355 CENLIVRES JA said this:

"... it is clear that an appeal can be noted not against the reasons for judgment but against the substantive order made by a Court. For instance, it is open to a respondent on appeal to contend that the order appealed against should be supported on grounds which were rejected by the trial judge: he cannot note a cross-appeal under Rule 6 (4) unless he desires a variation of the order. See *Municipal Council of Bulawayo v Bulawayo Waterworks Ltd* 1915 AD 611 at pp 625, 631, 632. In the present case the notice of appeal is not against the order granted by the Transvaal Provincial Division but against that part of the reasons for judgment in which it was held that the appellants had acted arbitrarily." (own emphasis)

[11] It has also been held in other jurisdictions that an appeal is directed at the substantive order of a court. The Canadian Court of Appeal in the case of *Ross v Canada Trust Company*, 2021 ONCA 161 made the essential point that:

"The authorities are clear: an appeal lies from the order or judgment, not the reasons for them: *R v Sheppard*, 2002 SCC 26, [2002] 1 S.C.R 869, at para 4. This important distinction is explained succinctly in John Sopinka, Mark A Gelowitz and W. David Radkin, *Sopinka and Gelowitz on the Conduct of an Appeal*, 4th ed. (LexisNexis, 2018, Toronto) at 1.11:

It is a fundamental premise in the law of appellate review that an appeal is taken against the formal judgment or order, as issued and entered in the court appealed from, and not against the reasons expressed by the court for granting the judgment or order. **Although an appellate court will frequently discover in the reasons for judgment errors of law that ultimately ground the reversal of the judgment or order, it is the correctness of the judgment or order that is in issue in the appeal, and not the correctness of the reasons.** An appeal directed at only a portion of the reasons, as opposed to the correctness of the order, is liable to be quashed" (*my emphasis*)

[12] In *casu*, the above *dicta* are eminently apposite. The court *a quo* did not issue a substantive order. It misdirected itself when it failed to pronounce an order upholding, dismissing or otherwise interfering with the ruling of the Designated Agent appealed against by the appellant. The order remained stored in the Judge's mind. The judgment of the court *a quo* was in that respect incomplete. It meant that there was no order that

this Court could relate to. The appellant therefore sought to appeal against the reasoning of the court *a quo*. The notice of appeal not having been directed at a substantive order, was therefore fatally defective.

[13] It is for the above reasons that the court, with the consent of the parties, struck the matter off the roll with no order as to costs.

GWAUNZA DCJ:

I agree

KUDYA JA:

I agree

Masiye-Moyo & Associates, legal practitioners for the appellant

Masawi & Partners, legal practitioners for the respondent