

REPORTABLE (06)

ZESA HOLDINGS (PRIVATE) LIMITED
v
(1) TAKAWIRA MUNYANYI (2) SAIDI SANGULA

SUPREME COURT OF ZIMBABWE
HARARE: 15 SEPTEMBER 2023 & 19 JANUARY 2024

C. Mahara, for the applicant

A. Maguchu, for the first respondent

No appearance for the second respondent

IN CHAMBERS

CHATUKUTA JA: This is a chamber application for condonation of non-compliance with the rules and extension of time within which to apply for leave to appeal to the Supreme Court made in terms of r 64 as read with r 43 (3) and r 60 (2) of the Supreme Court Rules, 2018 (“the Rules”).

BACKGROUND FACTS

The applicant is a registered company duly incorporated in terms of the laws of Zimbabwe. The first respondent is a labour officer from the Ministry of Public Service, Labour and Social Welfare, Department of Labour Relations. The second respondent was an employee of the applicant.

The second respondent was accused of misconduct under the Labour (National Employment Code of Conduct) Regulation, 2006 (Statutory 15 of 2006), (“the Code”). The matter was brought before the Disciplinary Committee (“the Committee”) of the applicant for a disciplinary hearing. For the Committee to comply with the Code, it must have completed the hearing within 30 working days. It failed to do so. The second respondent thereafter approached the first respondent for recourse. The latter issued a draft ruling and applied before the court *a quo* for its confirmation. The application was granted on 20 January 2022 and the court *a quo* ordered the reinstatement of the second respondent to his original position without loss of salary and benefits. The court *a quo* further ordered that if such reinstatement was no longer possible, the applicant was to pay damages *in lieu* of such reinstatement. By letter dated 30 March 2022, two months after the grant of the order, the applicant requested for written reasons for the order. The reasons were availed on 6 May 2022.

On 31 May 2022, four months after confirmation of the draft ruling, the applicant filed an application for leave to appeal in the Labour Court. The application was struck off the roll for the reason that it was filed out of time and the applicant had not sought condonation. In terms of r 43 of the Labour Court Rules, 2021, the applicant ought to have applied for leave to appeal within 21 days from the date of the decision of the Labour Court. The applicant thereafter filed an application for condonation for the late filing of an application for leave to appeal with the court *a quo* on 24 October 2022. In addition to condonation, it sought an extension of time within which to file its application for leave to appeal.

PROCEEDINGS BEFORE THE COURT A QUO

The applicant made the following submissions: The delay in filing an application for leave on time was occasioned by the bureaucratic nature of the applicant’s operations.

Authority had to be sought first from the Board of the applicant to give instructions to file the application in view of the second respondent's seniority. The applicant's counsel was under the belief that the *dies induciae* for the filing of the application would start running upon being furnished with written reasons for the order issued by the court *a quo*. The intended appeal had prospects of success. The court *a quo* had misdirected itself by ordering payment of damages *in lieu* of reinstatement when the second respondent had not been dismissed. The first respondent's draft ruling did not contain an order for damages. The court *a quo* had therefore erroneously altered the first respondent's order. The second respondent had secured alternative employment after the issuance of the first respondent's draft ruling, thereby terminating the contract of employment between the warring parties. The court *a quo* erred by not taking into account that development.

The second respondent opposed the application. He argued that the delay in filing the application was inordinate. He further argued that the explanation was unreasonable because counsel for the applicant failed to state the legal basis upon which he believed that the application could only be filed upon receipt of written reasons for the order. As regards, prospects of success, it was submitted that the intended appeal was not meritorious.

The court *a quo* dismissed the application on 17 May 2023. It held that the delay in filing the application was inordinate and that the applicant did not proffer a reasonable explanation for the delay in filing an application for leave and for the delay in seeking condonation. It further held that the applicant did not have prospects of success on appeal. In the absence of a request by the applicant to adduce new evidence, the court could not take into account evidence that arose after the decision of the first respondent. It further held that the other proposed grounds of appeal did not raise points of law.

Aggrieved by the decision of the court *a quo*, the applicant approached this Court in June 2023 under SC 300/23 seeking condonation and extension of time within which to apply for leave and for leave to appeal. The application was made in terms of r 61, r 60 (2) of the Rules. The matter was struck off the roll on 18 July 2023 for the reason that it was filed under the wrong rule. The present application was filed on 10 August 2023.

PROCEEDINGS BEFORE THIS COURT

At the hearing, Mr *Maguchu*, for the second respondent, raised two preliminary issues, firstly, that the application was improperly before the Court. He argued that the applicant could only approach this court after having unsuccessfully sought leave to appeal in the court *a quo*. It was submitted that the applicant did not seek leave in the court *a quo* and had therefore prematurely approached this Court. For this proposition, the second respondent relied on *Chomurema v Telone* SC 86/14.

Secondly, Mr *Maguchu* submitted as follows: The application was defective for the reason that it was made in terms of an inapplicable rule. Rule 43 of the Rules, in terms of which the application was filed, provides for applications for condonation and extension of time within which to appeal and does not relate to leave to appeal. The rule relates to matters emanating from the High Court and not the Labour Court. The applicant used an incorrect format instead of being guided by the peremptory provisions of r 72A of the Rules.

Per contra, Mr *Mahara*, for the applicant, submitted as follows: The application was properly before this Court. The rules do not provide for applications for condonation for late filing of an application for leave to appeal. Rule 64 of the Rules provides that r 43 of the Rules shall apply *mutatis mutandis* where there is a *casus omissus*. There being a *lacuna*, r 43

was applicable. The applicant relied on this proposition on *Zimbabwe Anti-Corruption Commission v Mangwiro & Anor* SC 11/22. Relying on the same case, it was submitted that it was redundant for it to seek leave to appeal from the same court that had dismissed its application for condonation. It was argued that the effect of the dismissal was to deny it access to the Supreme Court. It was therefore competent to proceed as it has done.

On the merits, Mr *Mahara* submitted that the applicant had satisfied the requirements for condonation. In support of this contention, he relied on the same arguments advanced in the court *a quo*. He, however, made an additional submission that there was a further delay as a result of the application in this Court under SC 300/23 seeking condonation and extension of time within which to apply for leave and for leave to appeal which was struck off the roll.

Per contra, Mr *Maguchu* also persisted with the arguments as advanced in the court *a quo*. He argued the requirements for condonation had not been met and that the application ought not to succeed.

ISSUE FOR DETERMINATION

The issue for determination is whether or not the application is properly before this Court.

APPLICATION OF THE LAW

In the court *a quo*, the applicant filed an application for condonation for the late filing of an application for leave to appeal which was dismissed for the reason that the applicant had failed to meet the requirements for such an application. Consequently, the applicant

approached this Court to seek condonation for the late filing of an application for leave to appeal coupled with an application to seek leave to appeal to this Court in accordance with r 64 as read with r 43 (3) and 60 (2) of the Rules.

A party aggrieved by the decision of the court *a quo* must apply for leave to appeal from that court in terms of s 92F (2) of the Labour Act. Section 92F of the Labour Act reads:

“92F. 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 President who made the decision** or, in his or her absence, from any other President leave to appeal that decision.
- (3) If the President refuses leave to appeal in terms of subsection (2), the party may seek leave from the judge of the Supreme Court to appeal.” (own emphasis)

The above section is clear and unambiguous. The use of the peremptory term ‘shall’ in subs (2) signifies that the provision must be strictly adhered to. The above provision explicitly sets out that a party intending to appeal a decision of the Labour Court **shall** seek the leave of that court. This is distinguishable from the wording of subs (3) which uses the word ‘may’ and is therefore discretionary. Once a party has complied with the mandatory dictates of subs (2) it is within its discretion to seek leave directly in the Supreme Court. The distinction between the two subsections clearly exhibits the legislature’s intent on how a party should proceed if it intends to challenge a decision of the Labour Court.

It is only when leave is denied by the Labour Court that a party thereafter “may” seek from this Court leave to appeal in terms of r 60 (2) of the Rules. Rule 60 (2) provides that:

“60 (2) An appeal from a decision of the Labour Court in terms of section 92F of the Labour Act [*Chapter 28:01*] shall be delivered, with the registrar, within 15 days from the grant of leave to appeal by the Labour Court or, when: such leave is refused, within 15 days from the grant of leave by a judge:”

The jurisdiction of this Court to entertain an application for leave to appeal is therefore premised on the court *a quo* having denied leave to appeal. GWAUNZA JA (as she then was) remarked in *Chomurema v Tel One* (*supra*), at para 6, that:

“6. What is evident is that the Labour Court did not consider the merits of the application for leave to appeal to the Supreme Court. Indeed, it could not have properly done so without first condoning the late filing of such an application. The applicants were barred and at that point in time, out of court.”

Prior to the determination of the application by GWAUNZA JA, the applicants in *Chomurema v Tel One* had brought another ill-fated application which was dismissed by GARWE JA (as he then was) as reflected in para 10 of the judgment which reads:

“10. The application was dismissed in chambers by GARWE JA on the 14th of December 2010, without considering the merits thereof and without giving written reasons for the decision. This was on the basis that this Court could not consider the application for leave to appeal to it before:-

- (i) Condonation for the late filing of that application in the Labour Court had been obtained, and,
- (ii) **The leave of the Labour Court had been properly sought and denied.**” (own emphasis)

The facts of that case were that the applicants had filed an application for leave to appeal in the Labour Court out of time. They did not file an application for condonation but merely alluded in the founding affidavit to the need for condonation. They did not incorporate the request for condonation in the draft order. The Labour Court held that there was no valid application for condonation before it. It however proceeded to determine and dismiss the application for leave to appeal. The applicants then approached this Court for leave to appeal.

The application was dismissed. The principle that emanates from the judgment in that case is that an application for leave to appeal must be filed and determined in the Labour Court before approaching the Supreme Court.

It is common cause that the applicant did not file before the court *a quo* an application for leave to appeal. It only filed an application for condonation. The application was dismissed. The applicant justifies the procedure it then adopted before me on the following remarks by KUDYA AJA (as he then was) in *ZACC v Mangwiro & Anor (supra)* at p 28:

“The effect of a dismissal of an application for condonation for leave to appeal is to deny the applicant access to the Supreme Court. The court *a quo* dismissed the only application that would have opened the applicant’s way to this Court. In the circumstances, it became legally impossible for the applicant to seek leave from the court *a quo*. The import of the dismissal was to refuse the applicant leave to appeal to this Court. The refusal, by operation of law, therefore, activated s 93 (F) of the Labour Act. In terms of r 60 (2) of the Supreme Court Rules, 2018, the applicant had, as at the date of the refusal (23 February 2018), 15 days within which to seek leave to appeal from a judge of this Court. Instead, for a period of three years, it went on a wild goose chase, in which it mounted five useless applications, which clearly wasted valuable judicial time.”

The applicant did not however relate to the remarks at p 7 where it is stated that:

“They correctly sought condonation for the late filing of the application for leave to appeal. It is not clear to me why they did not co-join that application with the actual application for leave to appeal”

KUDYA AJA judiciously drew attention to the fact that the proper procedure was to file an application for condonation and also for leave to appeal before approaching the Supreme Court, which procedure is consistent with the principle emanating from the *Chomurema v Tel One* case. I lament, *in casu*, as KUDYA AJA did, why the applicant did not file an application for leave to appeal and instead opted to seek to file its application after the granting of condonation.

My brother further remarked that:

“It would be absurd to require the applicant to seek leave to appeal against the dismissal and require the Supreme Court to determine whether condonation was properly refused or not. Such a circuitous route to appeal the substantive judgment could not have been in the contemplation of the Legislature, which amongst other things, requires that Labour matters be completed inexpensively and timeously with minimum regard to formalism.”

I do not agree, with respect, to KUDYA AJA that once an application for condonation has been dismissed, a party has the right of audience before this Court in the absence of an application in the Labour Court for leave to appeal and determination of that application. Section 92F explicitly states that the right to have an audience with the Supreme Court comes into effect the instant an application for leave to appeal is dismissed. The dismissal of an application for condonation cannot trigger the application of s 92F (3). The Supreme Court is a creature of statute. A judge of the Supreme Court derives his/her powers to determine an application for leave to appeal from s 92 F (3) of the Labour Act. He/she can only do so after the Labour Court has been seized with an application for leave and dismissed it. A judge, in chambers, cannot depart from the dictates of the Labour Act. To do so would amount to altering the Labour Act and arrogating to himself or herself legislative powers.

The effect of proceeding to determine the application before me, where condonation was declined by the court *a quo*, is an interference with the judgment of the court *a quo* declining condonation. The decision of the court *a quo* was an exercise of discretion. A single judge, in Chambers, is being called upon to interfere with the exercise of discretion of the court *a quo*. An interference with the exercise of discretion by a subordinate court can only be in terms of a process properly before the Supreme Court challenging that decision. There is no such process before this Court.

Consideration of the present application is tantamount to opening floodgates to litigants to circumvent a statutory requirement. The reliance by the applicant on *ZACC v Mangwiro & Anor* is evidence of such potential opening of floodgates. What is more worrying, *in casu*, is the applicant is legally represented. It did not relate in its heads of argument to the judgment in *Chomurema v Tel One* and attempt to distinguish it from the judgment in *ZACC v Mangwiro & Anor* despite the former judgment being referred to in the second respondent's opposing affidavit.

In the case of *FBC Bank Limited v Chiwanza* SC 31/17, at p 3, the Court asserted the importance of strictly adhering to the rules in the following remarks:

“It hardly needs mention that rules of court must be followed in order to ensure proper and good administration of justice. In *Sibanda v The State*, the court quoted the case of *S v McNab* 1986 (2) ZLR 280 (S) at 284E where DUMBUTSHENA CJ noted the following: - “I have dealt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the rules will encourage some legal practitioners to disregard the rules of court to the detriment of the good administration of justice.”

In the present matter, it is not just a disregard of the rules of court. It is a disregard of a provision of an Act of Parliament.

My brother KUDYA JA did not relate in his judgment to the decision in *Chomurema v Tel One* (*supra*). It appears that the authority was not brought to his attention. I opine that had it been brought to his attention, he may have arrived at a different decision. I am persuaded by the reasoning in *Chomurema v Tel One* that the applicant's application is prematurely and consequently, improperly before this Court and ought to be struck off the roll.

DISPOSITION

The preliminary issues raised by the second respondent, whether the application is improperly before me for failure to seek leave before the court *a quo* or for proceeding under a wrong section, pose the proverbial chicken and egg dilemma. Either point is dispositive of this application. On that premise, having found that the application is prematurely before me, the preliminary point is upheld. I find it not necessary to determine the other points raised by the second respondent. Neither is it necessary to relate to the merits of the application.

As regards costs, Mr *Maguchu* submitted that there would be no need for costs in the event that any of the preliminary points was upheld. There shall therefore be no order for costs.

In the result, it is accordingly ordered as follows:

The application be and is hereby struck off the roll with no order as to costs.

Mvingi & Mugadza, applicant's legal practitioners

Maguchu & Muchada Business Attorneys, respondent's legal practitioners