

REPORTABLE (18)

(1) TICHAONA MUDZINGWA (2) LILIAN GANJIRI
(3) CECILIA KAWARA (In her capacity as executrix *dativo* of Estate Late
TSAURAI KAWARA) (4) ELIZABETH SIBANDA (5) MUDYANAGO
ZHOU

v

(1) KIMBERWORTH INVESTMENTS PRIVATE LIMITED T/A SABI
GOLD MINE (2) VERUKAI EMILTON N.O

**THE SUPREME COURT OF ZIMBABWE
HARARE: 11 JANUARY 2024**

T. Mudzingwa, in Person

Lilian Ganjiri, in Person

Cecilia Kawara, in Person

Elizabeth Sibanda, in Person

Mudyango Zhou, in Person

N.A. Maguranyanga, for the first respondent

No appearance for the second respondent

IN CHAMBERS

CHITAKUNYE JA: This is an opposed chamber application for leave to appeal purportedly in terms of r 60(2) of the Supreme Court Rules, 2018. After hearing the application, I gave an *ex tempore* judgment striking the matter off the roll for the reason that the application was

fatally defective. The applicants have requested for written reasons for my decision. These are they.

FACTS

The first, second, fourth and fifth applicants are former employees of the first respondent. The third applicant is the surviving spouse of the late Tsaurai Kawara who was also employed by the first respondent. The second respondent is the Labour Officer who presided over a process of conciliation after which he issued a draft ruling.

In December 2018 the applicants' contracts of employment were terminated for the reason that the first respondent was placed under judicial management. The applicants challenged the decision to terminate their contracts of employment. The first respondent nevertheless approached the Magistrates Court seeking the eviction of the applicants from its houses. The order for eviction was granted.

Dissatisfied with the order for their eviction, the applicants appealed to the High Court which in turn declined jurisdiction as it held that the matter was a labour matter falling under the exclusive jurisdiction of the Labour Court. The matter was then taken before the second respondent for conciliation who issued a draft ruling in favour of the applicants.

BEFORE THE COURT A QUO

The second respondent applied for the confirmation of the draft ruling under LC/MD/78/22 before the Labour Court. The application was struck off the roll on

15 September 2022 for the wrong citation of parties thereto. A second application was filed. For a number of reasons, including that the application had been belatedly made without seeking condonation, that application was also struck off the roll on 7 November 2022.

The applicants then took it upon themselves to pursue the matter. They applied for leave to appeal against the judgment of 7 November 2022 in the court *a quo*. The application was struck off the roll on 6 February 2023. The applicants filed another application for leave to appeal after attending to the defects noted in the previous application. That application was dismissed on 23 October 2023.

Aggrieved, the applicants filed a chamber application for leave to appeal in this Court in SC 611/23. That application was struck off the roll on 8 December 2023 for, *inter alia*, failure to seek condonation for the late filing of the application and seeking an incompetent relief. This then gave birth to the current application filed on 14 December 2023.

BEFORE THIS COURT

The applicants in their founding papers show a desire to appeal against the decision of the Labour Court of the 23rd of October 2023, dismissing their application for leave to appeal. They state in the notice that:

“The Applicants are challenging the entire judgment issued by Honourable Justice CHIDZIVA J, LC/MD/25/23 for case LC/MD/26/23 on the 23rd October 2023, held at Gweru.”

Thereafter, they state a number of grounds upon which they allege that the court *a quo* erred and misdirected itself.

In para 10 of the founding affidavit the applicants again state the nature of the application as:

“This is a chamber application for leave to appeal to the Supreme Court challenging the dismissal of the chamber application for leave to appeal on the 23rd October 2023, the judgment was issued by Honourable Justice CHIDZIVA J, LC/MD/25/23 for case LC/MD/26/23 on the 23rd of October 2023, held at Labour Court, Gweru on the 2nd of October 2023.”

On the other hand, r 60 (2) provides that:

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

Provided that **where leave to appeal is refused by the Labour Court, the applicant shall apply for leave to appeal to a judge within ten days of the refusal to grant leave.**” (emphasis added)

In *casu*, the decision refusing leave to appeal was rendered on 23 October 2023 and the applicants were supposed to apply for leave to appeal to this Court within 10 days of that date. They, instead, filed this application on 14 December 2023 well after the 10 days. The previous application to this Court had also been filed out of time and was seeking an incompetent relief hence it was struck off the roll as applicants had, *inter alia*, not sought condonation. Equally, in filing this application the applicants have not sought condonation. They argued that in terms of Practice Direction 3 of 2013 all they were required to do was to approach the court within 30 days from the date the application was struck off the roll and that there was no need to apply for condonation. Unfortunately, the applicants are mistaken as the Practice Direction does not override the requirement to seek condonation for failure to comply with the rules within the prescribed *dies induciae*. The Practice Direction gives a litigant a period within which to attend to the defects that led to the application or process being struck off the roll and re-approach the court with a valid

application or process. In *casu*, they would have been required to address all the defects noted in their application including seeking condonation for failure to file the application within 10 days from the date their application in the court *a quo* was dismissed. The failure to seek condonation invalidates this application.

Another aspect invalidating the application is that instead of seeking leave to appeal against the decision of 7 November 2022 wherein the second respondent's application for confirmation of the draft ruling was struck off the roll, the applicants, as noted above, are in fact seeking to appeal against the order of 23 October 2023 dismissing their application for leave to appeal. As noted above r 60 (2) does not provide for an appeal against the refusal to grant leave by the Labour Court, instead, it grants an aggrieved party the right to launch a similar application for leave before a judge of this Court. In that application, the applicant is required to show that there are prospects of success in the intended appeal, which in this case would be the judgment of 7 November 2022. As a result of the failure to appreciate the nature of the application, the applicants did not address the requirements of an application for leave to appeal such as the prospects of success on appeal against the decision of 7 November 2022.

A further challenge with this application is that there is no draft order in respect of this application, SC 689/23 hence rendering the application invalid. In any case the nature of the relief discernible from the notice and founding affidavit is for the setting aside of the judgment of 23 October 2023 and substituting it with an order granting leave to appeal. It is axiomatic that for leave to appeal against the judgement of 7 November 2022 to be granted the applicants must show, *inter alia*, that there are prospects of success on appeal as leave is not granted at the mere asking.

See *Chikurunhe v Zimbabwe Financial Holdings* SC 10/08 and *Mpofu v NSSA* SC 105/22. The order granting leave to appeal cannot be granted just for the asking when there is nothing on record to show that there are any prospects of success in respect of the intended appeal. In *casu*, the applicants did not attach the judgment of 7 November 2022 and so I would not be able to assess if there are prospects of success even if I were to consider the merits of the application.

In *Ilasha Mining (Pvt) Ltd v Yatakala Trading (Pvt) Ltd t/a Viking Hardware Distributors* SC 61/18 at p 3 BHUNU JA aptly noted that:

“Apart from the above irregularity the application is a parody of more serious fatal procedural irregularities, chief among them failure to provide a copy of the impugned judgment. It is an exercise in futility for a litigant to attack a judgment of a lower court in a higher court without availing the court *a quo*’s judgment for scrutiny by the higher court to assess the veracity of the applicant’s criticism of the judgment. The applicant’s failure to avail the impugned judgment before me renders its criticism of the judgment hollow and nugatory.

That finding of fact and law renders the applicant’s submissions on its prospects of success valueless and not worth the paper upon which they are written as no weight can be placed on the submissions in the absence of the impugned judgment.”

In *casu*, the leave to appeal they seek as a substituted order can only be considered and granted if they show that there are prospects of success in that matter. As it is, there is nothing upon which to assess such prospects in the absence of the judgment of 7 November 2022.

It was upon consideration of all the defects afflicting this matter that I concluded that there was no valid application for leave to appeal before me as envisaged under r 60(2).

On the issue of costs, counsel for the first respondent asked for costs and the applicants opposed the request. It is trite that the issue of costs is within the court’s discretion. Such discretion

must, however, be properly exercised taking into account the circumstances of each case. Counsel for the first respondent submitted that the applicants were advised to seek legal assistance in order for them to be well informed about the processes they are undertaking but such advice seems to have fallen on deaf ears. The applicants have continued to bring defective applications. The applicants, on the other hand, indicated that they have made an effort to seek legal assistance and this application is a result of such assistance.

Upon a careful consideration of the submissions made, I concluded that the circumstances of this case call for a measure of appreciation of the applicants' predicament. This is a labour matter pitting a well-resourced first respondent against poorly resourced applicants who believe they are being shortchanged by their employer and hence are desperately trying to recoup the little they can from their contracts of employment. The circumstances under which their employment was said to have been terminated and the fact that the draft ruling was in their favour has spurred them to seek justice. The officer who ought to have ensured the draft ruling was properly placed before the Labour Court has not done so. It may not be just and fair to saddle them with costs at this stage. It is, however, appropriate to indicate that any further persistence in bringing invalid court processes may result in them being mulcted with costs. They ought to seek and accept proper legal assistance or advice before embarking on legal process. The matter was thus struck off the roll with no order as to costs.

DISPOSITION

There being no valid application before the court the matter was struck off the roll with no order as to costs.

Mutendi, Mudisi & Shumba Legal Practitioners, first respondent's legal practitioners