REPORTABLE (17)

FBC BANK LIMITED
v
(1) KUDZAI KWANGWARI (2) REGISTRAR OF THE LABOUR COURT

SUPREME COURT OF ZIMBABWE.
HARARE 7 OCTOBER 2024 & 27 FEBRUARY 2025

P. Dube, for the applicant.

N. Mangoi, for the respondent.

IN CHAMBERS

UCHENA JA.

[1] This is an opposed application for leave to appeal against a judgment of the Labour Court in which it up held a preliminary issue raised by the respondent and struck the applicant's application for rescission of a default judgment off the roll.

FACTUAL BACKGROUND

[2] The applicant FBC Bank Limited, is a commercial bank duly incorporated and registered in terms of the laws of Zimbabwe. The first respondent was employed by the applicant as a supervisor. He was charged with and convicted of misconduct and dismissed from employment.

The second respondent is the Registrar of the Labour Court Harare. The first respondent filed an appeal in the Labour Court (court *a quo*) under LC/H/18/23. The respondent in that case was cited as FBC Building Society. On the date of hearing, FBC Building Society

defaulted. The court granted a default judgment allowing the first respondent's appeal. The applicant failed to make an application for rescission of the default judgment timeously, leading to its lodging an application for condonation of its late filing of an application for rescission of the default judgment. On the day of the hearing of the application for condonation, the applicant was in default, leading to the issuance of another default judgment by the Labour Court. Aggrieved by that decision, the applicant filed an application for rescission of the default judgement in case number LC/H/1010/23.

[3] After hearing the application on preliminary points the court *a quo* issued the following order:

> "The Court makes the following order:
>
> 1. The first preliminary point in respect of alleged defective Draft Orders is hereby dismissed.
> 2. The second preliminary point relating to the propriety of the present application is hereby upheld.
> 3. The application is hereby struck off the roll as it is improperly before the Court.
> 4. Each party to meet its own costs."

[4] The applicant applied to the court *a quo* for leave to appeal to this Court against the striking off the roll, of its application for rescission of the default judgment.

[5] The court *a quo* dismissed the applicant's application for leave to appeal after which the applicant applied to this Court for leave to appeal against the court *a quo's* judgment in the application for the rescission of a default judgment.

[6] In its intended appeal the applicant seeks the following relief:

> "**WHEREFORE**, the Appellant prays for the following relief:
>
> 1. That the instant appeal succeeds with costs.

2. That the judgment of the Labour Court by MURASI J dated 14 March 2024 under number LCH 109/24 be and is hereby set aside and substituted with the following;

(a) **That the application for rescission of default judgment per Murasi J dated 7th November 2023 under judgment number LCH/747/23 be and is hereby granted**." (Emphasis added)

SUBMISSIONS BEFORE THIS COURT.

[7] At the hearing of this application, Mr *Dube*, counsel for the applicant, submitted that an application for leave to appeal from a judgment of the Labour Court is based on two main points namely:

1. That the intended appeal is on questions of law
2. That the applicant has an arguable case on appeal.

He submitted that the grounds of appeal appearing on pp 255-256 of the record establish that the intended appeal is on questions of law. He submitted that it was difficult for the applicant to argue on the merits as the court *a quo* found that there was an error on the IECMS system which resulted in the failure to serve the applicant with the notice of hearing. He argued that the court *a quo* erred in applying the fault test thereby granting a default judgment against the applicant. Counsel further contended that the court *a quo* erred in holding that the applicant was supposed to lodge a composite application for correction and rescission. Upon being questioned by the court, counsel for the applicant conceded that the applicant had not exhausted all domestic remedies and could make a valid application for rescission of the default judgment before the court *a quo.* He without specifying the wording; of the court *a quo's* order, submitted that the applicant intended to appeal against the order of the court *a quo*.

[8] Per *contra*, Ms *Mangoi* counsel for the first respondent submitted that the applicant's application does not comply with the requirements for an application for leave to appeal.

She submitted that the application does not comply with the provisions of r 59 (3) (d) of the Supreme Court Rules, 2018. She averred that the relief sought by the applicant in its intended notice of appeal is fatally defective as the record establishes that at the hearing *a quo* the case was only heard on preliminary issues but the relief sought seeks the granting of the application for rescission. She submitted that the application seeks an order which could not have been granted by the court *a quo* after only hearing the parties on preliminary issues. She, further submitted that the order sought renders the application fatally defective as it is contrary to the provisions of r 59 (3) (d) of the Rules of this Court.

[9] She further submitted that the appeal is not based on questions of law and that the intended appeal enjoys no prospects of success. She relied on the case of *Muzuva* v *United Bottlers (Pvt) Ltd* 1993 (2) ZLR 164 (SC) where this Court defined what a question of law is.

[10] Ms *Mangoi*, also argued, that as was held in *Muza* v *Saruchera & Ors* SC 45/18, the applicant's intended grounds of appeal establish that the applicant intends to appeal against *obiter dictum* which is not permissible at law. She further submitted that the applicant had no *locus standi* to pursue the present application because it had been cited as FBC Building Society in the default judgment it seeks to rescind instead of FBC Bank Limited. She therefore argued that it was not a party to the default judgment it seeks to rescind. She further submitted that the application for leave is to enable the applicant to appeal against unterminated proceedings.

[11] In response Mr *Dube* argued that the application was not fatally defective and can be related to and be granted. He further argued that the applicant has locus standi as it is the 1st respondent's employer which charged him with misconduct and dismissed him from

employment, which dismissal the first respondent appealed against, to the Labour Court and a default judgment was granted. He admitted that the applicant could have filed another application before the Labour Court as the applicant's application was struck off the roll on a preliminary issue. He submitted that the intended appeal is on questions of law and has prospects of success on appeal.

THE ISSUES

[12] The following issues arise for determination.

1. Whether or not there is a valid application before me.
2. Whether or not the applicant has locus standi.
3. Whether an application for leave to appeal against unterminated proceedings can be granted
4. Whether or not the appellant can appeal against obiter dictum.
5. Whether or not the intended grounds of appeal are on questions of law.
6. Whether or not the intended appeal has prospects of success.

ANALYSIS

Whether or not there is a valid application before me

[13] Rule 59 (3) in which sub r (3) (d) is found provides as follows:

> "(3) The notice of appeal **shall state—**
> (a) the date on which the decision was given;
> (b) the tribunal or officer whose decision is appealed against;
> (c) the grounds of appeal in accordance with rule 44;
> (d) **the exact nature of the relief sought;**
> (e) the address of the appellant or his or her legal representative; and
> (f) if leave to appeal was granted, the date of such grant."(Emphasis added)

[14] The provisions of r 59 (3) (d) are mandatory. They require an applicant who is seeking leave to state the exact nature of the relief sought. The effect of failure to comply with

mandatory rules of the court was stated in *Econet Wireless (Pvt) Ltd* v *Trustco Mobile (Proprietary) Ltd & Anor* at p 10 where GARWE JA (as he then was) said;

> "The position is now well established that a notice of appeal must comply with the mandatory provisions of the Rules and that if it does not it is a nullity and cannot be condoned or amended. See *Jensen v Acavalos* 1993 (1) ZLR 216 (S)."

[15] In this case the decision of the court *a quo* being based on preliminary issues could not have resulted in the court *a quo* determining the case on the merits. The applicant's intended notice of appeal can therefore not validly seek an order granting the rescission of the default judgment, which could not have been granted by the court *a quo* because it did not hear the application for rescission of judgment on the merits. The applicant's argument that the relief sought should be accepted because it can be related to is, not consistent with the provisions of r 59 (3) (d). It is contrary to this court's decision in *Christopher Sambaza v Al Shams Global BVI Limited* SC 3/18 which interpreted the provisions of r 29 (1) (e)) of the old Supreme Court Rules which was enacted in words identical to those used in r 59 (1) (d) .

[16] I am however, also aware of this Court's decision in *Sobuza Gula Ndebele v Chinembiri Bhunu* SC 34/10 in which this court in interpreting r 29 (1) (e) held that a prayer which the court cannot grant for the reason that it is incompetent is not fatally defective as it can be amended. The court held that:

> "In my view, once the prayer clearly sets out the nature of the relief sought as it does in this case r 29 (1) (e) has been complied with. This being so, the Court can and may amend the Notice of appeal upon application being made before the hearing subject to the rules governing applications of this nature."

[17] I can in the circumstances as a judge in chambers not resolve the divergence of views by this court on this issue by finding that the, applicant's application is fatally defective when

this court in SC 34/10 held that it is not. I will therefore give the applicant the benefit of the lack of clarity on this issue.

Whether or not the applicant has *locus standi*

[18] The respondent submitted that the applicant has no locus standi in this case because the default judgment it seeks to rescind is not against it. The applicant argued that it is the employer of the first respondent and is the employer which charged the first respondent with misconduct and dismissed him from employment. Its decision was set aside by the first default judgment. I agree that the applicant has sufficient interest in this case as it has interest in whether or not the first respondent is still its employee. It therefore has *locus standi*.

Whether the applicant can apply for leave to appeal against unterminated Proceedings.

[19] In terms of the Chief Justice's Practice Directive 3 of 2013:

> "Where a matter has been struck off the roll for failure by a party to abide by the rules of the court, the party will have thirty (30) days within which to rectify the defect failing which the matter will be deemed to have been abandoned.
>
> Provided that a Judge may on application and for good cause shown, reinstate the matter, on such terms as he deems fit,"

[20] The applicant applied for leave to appeal against the striking off, of its application off the roll. This means its application for rescission of the default judgment has not been determined on the merits by the Court *a quo*. During the hearing Mr *Dube* for the applicant, in response to my question on whether the applicant did not have a right to make a valid application for rescission of judgment to the court *a quo* said it could rely on that option.

[21] It is therefore obvious that this is a case where the applicant chose to seek leave to appeal to this court instead of making a valid application for rescission of judgment, to the court *a quo*.

[22] The application for rescission of judgment, has not been determined on the merits. It is trite that superior courts cannot lightly, interfere with unterminated proceedings of lower courts. In the case of *Machipisa v Nduna N.O & Anor* SC 89/23, it was held as follows:

> "They can only do so in exceptional circumstances where the trial court's proceedings will have been affected by gross irregularities which irredeemably vitiates the proceedings. Unterminated proceedings can also be reviewed and set aside if the interlocutory order of the trial court is clearly wrong. In the case\ of *Attorney General v Makamba* 2005 (2) ZLR 54 (S) at 648D MALABA JA (as he then was) said:
>
> > 'The general rule is that a superior court should intervene in uncompleted proceedings in the lower courts only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant'".

[23] In the case of *Prosecutor General of Zimbabwe* v *Intratek Zimbabwe (Pvt) Ltd & Ors* SC 67/20 MAKARAU JA (as she then was) dealing with the same issue at p 8 of the cyclostyled judgment said:

> "Thus, put conversely, the general rule is that superior courts must wait for the completion of the proceedings in the lower court before interfering with any interlocutory decision made during the proceedings. The exception to the rule is that only in rare or exceptional circumstances where the gross irregularity complained of goes to the root of the proceedings, vitiating the proceedings irreparably, may superior courts interfere with ongoing proceedings."

[24] The decision of the court *a quo* cannot be said to be clearly wrong, and the applicant's counsel agreed that the applicant can re-apply for rescission of the default judgment to

the Court *a quo.* The alleged irregularity by the court a quo does not go to the root of the proceedings, nor does it irreparably vitiate them.

[25] There is therefore no justification for interfering with the unterminated proceedings. The application for leave to appeal against the decision of the Court *a quo* should be dismissed.

DISPOSITION

[26] The applicant's application being for leave to appeal against unterminated proceedings cannot be granted. There is no need to determine the remaining issues. There is no reason why costs should not follow the result.

[27] It is therefore ordered as follows:-

"The application be and is hereby dismissed with costs."

Dube, Manikai & Hwacha, applicant's legal practitioners.

Messrs Matsikidze Attorneys, 1st respondent's legal practitioners.