

DISTRIBUTABLE: (13)

(1) CRISPEN VUNDLA (2) DAVID MUCHINGURI
V
(1) INNSCOR AFRICA BREAD COMPANY ZIMBABWE
(PRIVATE) LIMITED (2) MAXWELL SABILIKA N.O

**SUPREME COURT OF ZIMBAWE
KUDYA AJA
HARARE 1 JUNE 2021 & 1 FEBRUARY 2022**

O. Mashuma, for the applicants

Ms. S Njerere, for the first respondent

No appearance for the second respondent

IN CHAMBERS

KUDYA AJA: On 13 April 2021, the applicants filed a chamber application for condonation and extension of time to appeal in terms of r 61 as read with r 43 of the Supreme Court Rules, 2018. It is opposed by the first respondent.

They seek the following relief:

1. The application for condonation and non-compliance with r 60 (2) of the Supreme Court Rules, 2018 be and is hereby granted,

2. The application for extension of time within which to file and serve a notice of appeal in terms of the Rules be and is hereby granted.
3. The applicants shall file their notice of appeal within five (5) days after the date this order is granted.
4. Each party shall bear its own costs.

THE FACTS

The deponent to the applicants' founding affidavit was their legal practitioner of record by reason of his intimate involvement in the matter and the purely procedural nature of the relief sought.

The legal practitioner has acted in that capacity from the time the two challenged the termination of their employment before a labour officer on 20 November 2015, in the confirmation proceedings before the Labour Court on 18 November 2016 and in the three false starts that this matter has had in this Court in SC 566/17 (an appeal), SC 743/17 (application for striking of the appeal by the first respondent) and SC 1089/17 (an application for joinder by the first respondent).

The two applicants were formerly employed by the first respondent as a procurement director and general manager, respectively.

The first respondent (the employer) is a confectionery company incorporated in Zimbabwe, which is no longer trading. It has however been succeeded by *Innscor Africa Ltd t/a Baker Inn Bakeries*. The second respondent is the labour officer who heard the dispute between the parties and sought confirmation of his ruling in the Labour Court in November 2016.

The first applicant and the employer purportedly concluded a consensual written agreement of termination of employment on 5 June 2014. The agreement was alleged to have been brokered by Owen Murumbi, the former Finance and Human Resources Director of the employer. The two parties signed the agreement and Murumbi also appended his signature as a witness to the agreement. The first applicant regards the termination to be a retrenchment process.

The second applicant was retrenched with the approval of the Retrenchment Board (the board) on 5 December 2014. He signed a retrenchment agreement in which, in para 5, he absolved the first respondent from any further claims arising from the retrenchment process.

The two applicants were aggrieved by the entire retrenchment process. They requested the labour officer to adjudicate a case of unfair dismissal and non-payment of employment benefits. The labour officer dismissed their claim in his draft ruling on 2 September 2016.

He provisionally held that the termination in respect of the first applicant was by mutual consent. He found that mutual consent was depicted by firstly, the signatures of the first applicant and his witness. And secondly, by the first applicant's unequivocal acceptance and consumption of the terminal package. Regarding the second applicant, he found that he had been properly retrenched in accordance with the relevant statutory dictates of the Labour Act.

He also found the second applicant's specific disclaimer against the first respondent in respect of any prospective claims arising from the retrenchment process and his unequivocal acceptance and utilization of his substantial retrenchment benefits to be inconsistent with the challenge before him.

He further found that both applicants had by their acceptance without reservation and further utilization of the terminal benefits waived their legal right to challenge their respective termination processes.

Lastly, he declined to assume jurisdiction in respect of the share subscription agreement on two bases. The first was that the first applicant had failed to establish that the agreement was concluded with his employer. The second was that it had a reservation arbitration clause.

Thereafter, the labour officer sought confirmation of his draft ruling at the Labour Court on 16 November 2016. The Labour Court confirmed the ruling on 19 May 2017. It specifically found that by virtue of their seniority in the first respondent, the applicants must have knowingly waived their rights to challenge their respective terminations by the acceptance without reservation and by the consumption of their terminal packages. It also confirmed that the labour officer lacked the jurisdiction to deal with the share subscription agreement as it was a contractual and not a labour issue.

Aggrieved, by the confirmation, the applicants appealed to this Court in SC 566/17 on 4 August 2017. The subsequent chamber application instituted by the employer to strike off the appeal under SC 743/17, was dismissed. Resultantly, the employer sought to be joined in the appeal on 18 December 2017, in SC 1087/17. The application for joinder was set down together with the appeal hearing. At the hearing, on 22 February 2018, this Court *mero motu* raised the propriety of the confirmation proceedings. The views of this Court must have prevailed, as an order by consent in which the employer withdrew the joinder application while the applicants withdrew the appeal ensued.

A further attempt to file another notice of appeal at the Labour Court was declined by the Registrar of the Labour Court on the ground that such a notice was, in terms of s 92F of the Labour Act [*Chapter 28:01*] (the Act), due at the Supreme Court. Thereafter, the applicants' concerted effort to the Registrars of the Labour Court and Supreme Court in March 2018, for directions on the appropriate procedure to assail the draft ruling went unanswered.

On 25 September 2018, some seven months after the consensual withdrawals, this Court passed judgment in *Drum City (Private) Limited v Brenda Garudzo* SC 57/18. In that case, the labour officer entered a draft ruling in favour of the employee and against the employer. The labour officer then sought confirmation of the draft ruling before the Labour Court, in terms of s 93 (1) as read with s 93 (5a) and (5b) of the Act. She cited the losing employer as the only respondent, purportedly in terms of s 93 (5a), which required “the employer or any other person against whom the ruling is made” to be the respondent in the confirmation proceedings. This Court held that the legislature could not have intended to exclude a party with a direct and substantial interest in the confirmation proceedings, such as the employee in whose favour the draft ruling pertained, from participating in such proceedings as a co-respondent. It accordingly allowed the appeal, set aside the confirmation proceedings and remitted the matter to the Labour Court for the joinder of the employee and a rehearing of the confirmation.

However, at para [12] and [13] this Court, *en passant*, remarked that:

“[12]..... only if the labour officer rules against the employer or any person will he or she be required to take the steps outlined in ss (5a) and (5b). In other words, the provisions do not confer on the Labour Court the jurisdiction to confirm a draft ruling made against an employee¹. That this is the case is left in no doubt by the wording of s 93(5)(c)(ii) which specifically provides for a ruling like the one *in casu* in circumstances where the labour officer finds that the dispute of right in question ‘**must be resolved against any employer or other person in a specific manner ...**’

[13] Without a clear pronouncement to that effect, there can in my view be no doubt that reference to ‘any person’ in this provision, is not to be read as including the employee in the same dispute. I am satisfied that the import of the provision is to exclude the confirmation and registration of a draft ruling by the labour officer, which is made in favour of an employer and against an aggrieved employee. It follows that the Labour

¹ Such employee would, it seems, have to pursue other avenues to appeal against the draft ruling.

Court has no jurisdiction to entertain such a matter and should on that basis properly decline to hear it.”

These remarks were jettisoned by MALABA CJ in the Constitutional Court in *Isoquant Investments (Pvt) Ltd t/a ZIMOCO v Memory Darikwa* CCZ 6/20 at p 25. He pertinently observed that:

“One cannot interpret the *Drum City (Pvt) Ltd* case *supra* as authority for the proposition that it would only be cases where a draft ruling has been made against the employer that confirmation proceedings would ensue. The remarks were made as *obiter dictum*. The *ratio decidendi* of that case is that an employee must be joined in confirmation proceedings.”

The remarks in [12] and [13] were clearly *obiter dictum* because they did not relate to the issue that was before the court, which was whether or not the Labour Court could properly hear and determine an application for confirmation in which the employee was not cited. The remarks answered the question, which was not before the Supreme Court, whether confirmation proceedings could be lodged in respect of a draft ruling that was made against an employee. Before the Constitutional Court was a contention that the citation of the employer or other person against whom the draft ruling related to the exclusion of the employee infringed the employer’s right to equal protection and benefit of the law enshrined in s 56 (1) of the Constitution. The Constitutional Court, *inter alia*, relied on the *ratio decidendi* of the *Drum City (Private) Limited, supra*, and held that despite the “statutory ambiguity or vagueness” in the words “employer or other person” in s 93 (5a) and (5) (c) the employee was a necessary party to the proceedings. Further that the architecture of the entire provisions of s 93 of the Act required that a draft ruling

be subjected to confirmation proceedings irrespective of whether it was in favour of the employer and against the employee or in favour of the employee and against the employer.

It was on the basis of the reasoning of the Constitutional Court that the applicants lodged the present application on 13 April 2021. It was opposed by the first respondent on 20 April 2021. The applicants filed an answering affidavit on 22 April 2021. Thereafter, the applicants filed their heads on 28 April 2021 while the first respondent did so on 12 May 2021.

THE PRELIMINARY ISSUE

In her written heads of argument and at the hearing, Ms. *Njerere*, for the first respondent, raised the issue of prescription as a preliminary point. The first respondent did not plead prescription in its opposing affidavit but raised it for the first time in its written heads of argument. Ms. *Njerere* contended that, prescription, being a question of law could be raised at any time in the proceedings. She argued that the applicants' right of appeal and by extension the right to sue out the present application constituted a debt as defined in the Prescription Act [*Chapter 8:11*], which was susceptible to the vagaries of prescription in terms of s 15 (d) of that Act. It was common cause that the period between the date on which the applicants withdrew their appeal (22 February 2018) and the date on which they filed the present application (12 April 2021) was in excess of 3 years.

Mr *Mashuma* for the applicants made the contrary contention that, as the present application was governed by the provisions of r 61 as read with r 43, it could not be affected by

prescription. He argued that the applicants were not claiming the right to appeal in the same way that a litigant would sue for a debt. The right to appeal was in existence but had not been exercised at the stipulated time. The present application, so his argument went, was therefore governed by the requirements for condonation and extension of time within which to appeal and not by the Prescription Act.

The relevant provisions of the Prescription Act that fall to be considered in this application are s 2, 13 (1), 15 (a) (ii) and (d) and 20 (2). They state the following:

“2 Interpretation

In this Act—

“debt”, without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise”

“13 Debts to which Part IV applies

(1) This Part shall, save in so far as it is inconsistent with any enactment which—

(a) provides for a specified period within which—

(i) a claim is to be made; or

(ii) an action is to be instituted; in respect of a debt; or

(b) imposes conditions on the institution of an action for the recovery of a debt; apply to any debt arising on or after the 1st January, 1976.”

“15 Periods of prescription of debts

The period of prescription of a debt shall be—

(a) thirty years, in the case of—

(ii) a judgment debt;

(d) except where any enactment provides otherwise, three years, in the case of any other debt”.

“20 Prescription to be raised in pleadings

(2) A party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings:

Provided that a court may allow prescription to be raised at any stage of the proceedings”.

Rule 61 prescribes as follows:

“61. Applications for extension of time to appeal

Save where it is expressly or by necessary implication prohibited by the enactment concerned, a judge may, if special circumstances are shown by way of an application in writing, condone the late noting of the appeal and extend the time laid down, whether by rule 60 or by the enactment concerned, for instituting an appeal.”

Sections 13 (1) and 15 (d) of the Prescription Act subordinates the provisions and application of the Prescription Act to the provisions of any other enactment that specifically deals with this subject matter. Section 15 (d), however, limits the period of prescription to 3 years from the period that the debt becomes due.

The definition of debt in the Prescription Act is of wide application. It covers the right to sue for or claim emanating from *inter alia* a statute. The right that arises in these proceedings is the right to claim condonation and extension of time to note an appeal. The exercise of that right is set out in r 61 of the Supreme Court Rules, 2018. In terms of s 3 of the Interpretation Act [Chapter 1:01], a statutory instrument falls into the definition of an enactment. The Supreme Court Rules, 2018 are therefore an enactment, referenced in s 13(1) (b) of the Prescription Act. To the extent that the right to claim condonation and extension of time is a debt, the right to claim it falls squarely into the ambit of r 61. This rule “imposes conditions on the institution of an action for the recovery of (the) debt”. It is clear from the scheme of s 13 (1) that the Prescription Act is subordinated to the requirements of r 61 of the Supreme Court Rules, 2018. That rule specifies the period within which the debt may be claimed by use of the phrase “the late noting of the appeal and extend the time laid down...for instituting an appeal.” The

conditions imposed by the rule are demonstrable “special circumstances” and instituting “an application in writing”.

It is therefore my view that r 61 of the Supreme Court Rules, 2018, is excluded from the application of s 15 (d) of the Prescription Act by the provisions of s 13 (1) (b) of the same Act. The preliminary point would fail on this score.

Again, the prescription argument falters on a proper construction of the provisions of s 20 (2) of the Prescription Act. In order to rely on prescription, the first respondent must successfully meet two procedural requirements. It must have pleaded the point in its opposing affidavit failing which it must have sought the leave of the court to argue the point. It did not do any of these two things.

The preliminary point is therefore improperly before me and ought to be struck out.

THE MERITS

The requirements for the application

A court considers the extent of the delay, reasonableness of the explanation for the delay, prospects of success, and importance of the case, respondent’s interest in the finality of his judgment, convenience of the court and avoidance of unnecessary delay in the administration of justice. However, it is trite that the main requirements for an application of this nature are the

extent of the delay, the reasonableness of the explanation for the delay and the prospects of success. See *Ester Mzite v Damafalls Investments (Private) Limited* SC 21/18.

THE EXTENT OF THE DELAY

The Labour Court refused to confirm the proceedings on 19 March 2017. Leave to appeal was granted on by that court on 9 July 2017. The appeal should have been filed by 15 August 2017. The present application was filed on 20 April 2021. It is common cause that this period, which is in excess of 3 years and eight months is inordinate.

THE REASONABLENESS OF THE EXPLANATION FOR THE DELAY

The real reason for the delay was that applicants were prevailed upon by this Court to withdraw the appeal on 22 February 2018. The applicants withdrew the appeal because they accepted the misconception that confirmation proceedings that they sought to impugn were a nullity by reason of lack of jurisdiction by the Labour Court to confirm a draft ruling made against an employee by a labour officer. That view was subsequently affirmed by this Court in *Drum City (Pvt) Ltd v Brenda Garudzo* SC 57/18 at paras [12] and [13]. It was, however, authoritatively jettisoned by the Constitutional Court in *Isoquant Investments (Private) Limited t/a ZIMOCO v Memory Darikwa* CCZ 6/20 at p 25.

The applicants have always been desirous to test the correctness of the judgment appealed against but for the misinterpretation of the relevant provision of the Labour Act by this Court. This is demonstrated by their desperate attempt in March 2018 to appeal the confirmation

in the Labour Court under the mistaken belief that it had reverted to being the decision of the labour officer.

I would have accepted the explanation on the misconstruction of the jurisdiction of the Labour Court by this Court to have been a reasonable explanation for the delay had the applicants filed the present application soon after the reasons for judgment were availed in the *Isoquant* matter, *supra*, in June 2020.

The applicants, however, justified their failure to file the application soon after the *Isoquant* judgment on the COVID 19 induced Lockdowns. The endemic lockdowns resulted in the closure of court operations between 30 March 2020 and 11 May 2020 and 5 January 2021 to 1 March 2021. During this period only urgent matters were set down, heard and determined. The courts were, however, in full session between 11 May 2020 and 4 January 2021 and between 1 March 2021 and the date on which the applicants filed the present application on 12 April 2021. There was no legal impediment against the filing of the application immediately the reasons for judgment were delivered in the *Isoquant* case. The applicants did not proffer any reasonable explanation as to why they failed to lodge the present application during these periods. My overall finding is, therefore, that the explanation given for the delay was unreasonable.

I agree with Ms. *Njerere* that, the applicants failed to provide a reasonable explanation for the inordinate delay.

THE PROSPECTS OF SUCCESS

The three main factors are not individually decisive in granting the indulgence sought by the applicants. The remarks of SANDURA JA in *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S) are worth repeating. He stated that:

“Whilst the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus in the case of a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be.”

In the present case, strong prospects of appeal may be the determinant factor. It is common cause that the parties did not produce the consensual agreement to the labour officer. The first respondent failed to locate it and suggested that it must have been illegally removed from its custody by its former Finance and Human Resources director, Owen Murumbi, on the subsequent termination of his employment. The first appellant maintained such an agreement did not exist. The labour officer and the court *a quo* made positive findings that the agreement was in existence and that the parties and their witnesses had appended their signatures on the agreement.

Mr *Mashuma* argued that such a positive finding by both the labour officer and the court *a quo* in the absence of the agreement was so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided, would have arrived at it. He, therefore submitted that such a finding constitutes a misdirection which allows this Court to interfere with it. His contention is based on the authority, amongst others, of *TM Supermarket v*

Mangwiro 2004 (1) ZLR 186 (S), *Reserve Bank v Granger & Anor* SC 34/01, and *Zvokusekwa v Bikita Rural District Council* SC 44/15 at para [22].

Mr *Mashuma*, further contended that the failure to apply the preemptory retrenchment procedures set out in s 12C (11) (a) (i) and (ii) and (b) (i) and (ii) of the Labour Act [Chapter 28:01] before its amendment by the Labour Amendment Act No. 5 of 2015 rendered the retrenchment a nullity.

Counsel for the applicants also contended that, contrary to the finding *a quo*, the acceptance of their terminal benefits could not properly constitute a waiver of their right to challenge the termination process. The contention was premised on two grounds. The first was that the termination was a nullity and could therefore not be waived. The second was that at the time they accepted the terminal benefits they were ignorant of its effect on their right to challenge the termination. They therefore argued that they lacked the requisite appreciation and concomitant intention to found waiver.

Mr *Mashuma* submitted that the principle of waiver articulated in *Chidziva & Ors v Zimbabwe Iron and Steel Company Ltd* 1997 (2) ZLR 368 (S) at 379 was no longer good law. This was because that decision predated the concept of social justice and equity embodied in s 2A of the Labour Act. This concept was recognized in *Stanbic Bank of Zimbabwe Ltd v Charamba* 2006 (1) ZLR 96 (S), *Madhatter Mining Company v Tapfuma* SC 51/14 at 15 and *Delta Beverages (Pvt) Ltd v Murandu* SC 38/15 at p14.

Per contra, counsel for the first respondent contended that the acceptance and consumption of the terminal packages constituted a waiver of their right to challenge the legality of their respective terminations.

THE LAW ON RETRENCHMENT

The Constitutional Court authoritatively laid down, *inter alia*, that the Labour Court's jurisdiction to confirm a labour officer's draft ruling in respect of a dispute or unfair labour practice, which is a dispute of right, could only be invoked if the labour officer strictly complied with all the prescribed procedural steps and substantive requirements of ss 93 (1) (3) and 95 (5) (c) in making the draft ruling. This principle was derived from the *ratio decidendi* of *Tsvangirai v Mugabe & Anor* 2006 (1) ZLR 148 (S), which was that the action or application commencing proceedings must be in accordance with the procedure prescribed by law to bring the dispute before the appropriate court for it to exercise jurisdiction to hear and determine the matter.

At p 27 MALABA CJ pertinently held that:

“This means that a matter that is not a product of compliance with the procedural and substantive requirements of these provisions would not fall within the class of matters over which the Labour Court would have jurisdiction in terms of s 93 (5a) of the Act. It would not be a matter which would be subject of the procedure for bringing such matters to the court *a quo*, as prescribed under s 93 (5a) of the Act. Bringing such a matter to the court *a quo* under the guise of invoking the procedure prescribed in the subsection, would not validly institute proceedings in that court in terms of s 93 (5a) of the Act. The court *a quo* would not have a valid matter over which to exercise jurisdiction”.

The jurisdiction of a labour officer to deal with a dispute or unfair labour practice, whether in respect of a dispute of interest or a dispute of right is anchored in s 93 (1) of the Labour Act. The dispute or unfair labour practice must have been properly referred to the labour officer. The propriety is based on four jurisdictional factors identified as the existence of a dispute, emanating from an employment relationship, outside the aegis of an employment code (per s 105 (5) and (6) of the Act) and the jurisdiction of an employment council (that is before a designated agent in terms of s 63 (3b) of the Act) and timeous referral.

The Constitutional Court further held that conciliation is a compulsory statutory process of mediation that is separate and distinct from arbitration and adjudication. At p 23 the Constitutional Court poignantly stated that:

“Procedures such as the hearing of oral submissions or the production of written submissions by the parties and the determination of matters in dispute, typical of the adjudication process, are alien to the conciliation process. During the conciliation process the labour officer collects information and attempts to settle the dispute between the parties in a friendly manner. It is neither a trial nor a hearing”.

Conciliation therefore constitutes the first consensus seeking step that is actively and not passively presided over by the labour officer but is driven by the disputants. The proper way of conducting conciliation, which was approved by the Constitutional Court generally involves the four stage approach that consists of the introduction, story-telling, dispute analysis and problem solving. These stages were borrowed from the South African labour case of *National Union of Metalworkers in SA& Ors v Cementation Africa Contracts (Pty) Ltd* (1998) 19 ILJ 1208 (LC) at para 21 (the NUMSA case) and the suggestions of various academic writers in the

field such as Grogan: *Labour Litigation and Dispute Resolution* 1st ed Juta p 113, Brand *et al Dispute Resolution* 5ed Juta pp 122-123, 127 and Darcy du Toit *et al Labour Relations law a Comprehensive Guide* 6ed Lexis Nexis pp 117-146

If the properly conducted conciliation fails to achieve a settlement within 30 days, or any further extension agreed to by the parties, from the commencement of the attempt at settlement, the labour officer issues a certificate of no settlement. The legal effect of such a certificate is that the dispute or unfair labour practice arising from a dispute of right, by operation of law, automatically and specifically proceeds to adjudication before the Labour Court in terms of s 93 (3) as read with s 93 (5) of the Labour Act and not to compulsory or voluntary arbitration. Such an application is a *sui generis* application that is within the contemplation of s 89 (1) of the Labour Act. It is only those disputes that involve disputes of interest for parties engaged in an essential service that take the arbitral route.

At pp. 22 and 24 of the *Isoquant* case, *supra*, it was held that the draft ruling is the exclusive domain of the labour officer that is prepared after issuing a certificate of no settlement. It is based on the information collected and collated by the labour officer during the process of conciliation. In either case, the draft ruling must then as “a matter of obligation” be subject to the provisions of subs (5a) and (5b). The draft ruling invokes the application of subs (5a) and (5b) of s 93 of the Act. It is a provisional ruling that bears no legal force nor is it capable of review or appeal by the parties to whom it relates. It only derives its life force if it is confirmed by the Labour Court in the automatic application that is lodged by the labour officer to that court.

It was emphatically held at p 11 of the *Isoquant* judgment, *supra*, that “if a labour officer engages in anything that is not conciliation, it is a nullity.”

Confirmation was adjudged to be a hearing in which the Labour Court examines the correctness of the facts and the law relied upon by the labour officer. The end result being that the Labour Court may confirm, set aside or substitute the draft ruling. It is required to make a correct determination based on its own facts and law. My understanding of the exposition rendered on the nature of confirmation proceedings is that they constitute a rehearing in the wider sense in which the Labour Court is not bound by the factual findings and legal expositions of the labour officer.

APPLICATION OF THE RETRENCHMENT LAW TO THE FACTS

The founding affidavit of the applicants fails to demonstrate that the conciliation conducted by the labour officer met the requirements set out in the *Isoquant* case, *supra*. The first respondent averred in the opposing affidavit that following upon the complaint of 31 August 2015, the labour officer issued a certificate of no settlement by agreement of the parties on 9 November 2015. Thereafter, on an undisclosed date the applicants filed a statement of claim while the first respondent filed its statement of defence on 9 December 2015. The applicants then filed their reply on 14 December 2016. It was common cause that the parties proceeded to file written submissions at the behest of the labour officer so as “to enable him to determine the matter.”

It is clear from these pleadings that the labour officer failed to conduct the conciliation in the manner stipulated in the *Isoquant* judgment, *supra*. A properly conducted conciliation does not require a statement of claim, response, reply and heads of argument. The labour officer does not make a determination in making his draft ruling. These features pertain to a hearing. Rather, he or she utilizes both the oral and written information and documents that he collects and collates from the parties to make a draft ruling. A draft ruling that emanates from improper procedural steps and substantive requirements is a nullity. It is incapable of invoking the confirmation jurisdiction of the Labour Court.

It is unlikely that the applicants will be able to surpass this hurdle on appeal. This will, therefore, dampen their prospects of success on appeal. I would dismiss the application for condonation and extension of time within which to appeal on this basis.

I proceed to deal with the merits of the matter for the sake of completeness.

In our law, a serious misdirection on the facts amounts to a misdirection in law. See *National Foods Limited v Magadza* S-105-95. In *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670A-D KORSAH JA explained the basis for this principle in the following words:

“...a misdirection is nothing more than an error in law made by a judge in his charge to a jury. I must, however, add this rider: there can be *misdirection as to the law* applicable to

the case being tried; and there can be *misdirection as to the evidence* in the case. For an appellant to avail himself of a misdirection as to the evidence, the nature and the circumstances of the case must be such that it is reasonably probable that the Tribunal would not have determined as it did had there been no misdirection; in other words, that the determination was irrational....The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion”.

And irrationality has subsequently been found to exist by this Court in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G-H:

“If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, (or) if it does not take into account some relevant consideration”.

The substance of the first ground of appeal meets the requirement for turning a factual attack into a question of law. It attacks a positive factual finding which is not based on any factual basis. The contention made by Mr *Mashuma* being that a court properly applying its mind would not have found the consensual agreement to have been established where its very existence was put in issue and in circumstances where the first respondent failed to produce the agreement. The second ground of appeal impugns the failure of the court *a quo* to strictly apply the relevant provisions of the Labour Act that governed the retrenchment of the applicants. The applicants relied on the strict construction rendered by this Court in *Stanbic Bank of Zimbabwe Limited v Charamba* 2006 (1) ZLR 96 (S) to the mandatory procedural steps and substantive requirements prescribed in the analogous provisions of the Labour Relations (Retrenchment)

Regulations, 1990 (Statutory Instrument 404 of 1990), which were a precursor to s 12C (1) to (11) of the Act, prior to its amendment by Act No. 5 of 2015.

I did not hear Ms. *Njerere* dispute the propriety and efficacy of these two grounds of appeal. She, however, pinned the respondent's case in opposition on the principle of waiver, assailed by the applicants in the third ground of appeal to the draft notice of appeal, arising from their acceptance without reservation and failure to tender back the substantial terminal benefits paid to them. Her submissions were firmly rooted in *Chidziva & Ors v Zimbabwe Iron and Steel Company Ltd* 1997 (2) ZLR 368 (S). It was held by the majority decision that notwithstanding the failure to abide by the peremptory provisions of the retrenchment process, the voluntary acceptance of the retrenchment package by the retrenched amounted to a waiver of the legal rights to challenge the propriety of the retrenchment process. A voluntary acceptance of a terminal package is clearly knowingly made. It is also inconsistent with the continuation of an employment relationship. It constitutes conduct which reasonably leads the employer to believe that the employment relationship is over. Thus whether the first applicant was terminated from employment by agreement or whether like the second applicant he was retrenched, their deliberate acceptance of their respective terminal packages was inconsistent with the continuation of the employment contract. They are unlikely to succeed in convincing this court on appeal that their conduct did not amount to waiver.

The *Charamba* case that they seek to rely on did not address the question of waiver. Nor did it make any reference to the *Chidziva* case, which took into account all the arguments

that the appellants will seek to rehash on appeal. The reliance upon the *Chidziva* case *a quo* cannot, therefore, be impugned on the ground that it applied the wrong law. In my view, the applicants are unlikely to successfully impugn the position of our law as expressed in the *Chidziva* case, *supra*.

The last ground of appeal seeks to assail the refusal *a quo* to assume jurisdiction over the non-payment of the value of shares purportedly allotted to the first applicant by the first respondent. It was common cause that first applicant's claim was based on a purported verbal agreement he concluded with the managing director of the first respondent. The first applicant averred that the managing director agreed to allocate a portion of his own shares in the first applicant to him. He claimed the value of these shares before the labour officer and on confirmation *a quo*. The court *a quo* like the labour officer held that the dispute over shares was not a dispute of right arising from the employment contract between the parties. In any event, in terms of the share subscription agreement, any dispute arising therefrom was to be resolved by arbitration before an arbitrator specifically appointed for that purpose whose decision would be final and binding. The issue could not be resolved by a labour officer at conciliation or by the Labour Court at confirmation. Again, there is no likelihood of success in respect of that ground on appeal.

The first respondent sought the dismissal of the application with higher costs. The main basis being that the applicants were acting *mala fide* by challenging the termination of their employment without tendering the terminal packages that they received, encashed and

consumed. While that is a persuasive point, I am satisfied that the applicants have always genuinely sought to appeal against the confirmation of the draft order. This is not a proper case for ordering costs on the higher scale. Rather, costs on the ordinary scale must follow the cause.

DISPOSITION

The application fails to meet all the three major requirements for condonation and extension of time within which to appeal. The applicants failed to show that, the conciliation, the draft ruling and the confirmation were conducted in accordance with the law and were therefore not a nullity. In those circumstances, the Labour Court could not assume jurisdiction to hear the confirmation. The application would also fail on the aspect of waiver as authoritatively set out in the *Chidziva* case.

In the circumstances, it is ordered that:

1. The application be and is hereby dismissed.
2. The applicants shall pay the first respondent's costs jointly and severally, the one paying the other to be absolved.

Mashuma Law Chambers, applicants' legal practitioners

Honey & Blanckenberg, first respondent's legal practitioners