Judgment No. SC 85/05
Civil Application No. 151/03

STEPHEN KUTIWA v ZIMPOST

SUPREME COURT OF ZIMBABWE
HARARE, MARCH 17, 2006

F M Katsande, for the applicant

D A Machingura, for the respondent

Before: ZIYAMBI JA, In Chambers, in terms of rule 5 of the Court Rules.

This is an application for an extension of time within which to appeal against a judgment of the Labour Relations Tribunal (now the Labour Court) (hereinafter referred to as 'the Tribunal') handed down on 9 December 2002.

The applicant, who was employed by the respondent as a Superintendent, was charged with misconduct the allegation being that the applicant, whose job included the conduct of spot checks, had falsified books of account at Mandava Sub Post Office ('the sub post office') by placing ticks on the balance book indicating that he had actually counted the cash and stocks when in fact he had not done so. A subsequent audit revealed a shortfall of $13 000 after the applicant had been to the sub post office to check on two occasions. The sub post office was closed as a result.

The applicant admitted at the disciplinary hearing that, subsequent to the closure of the sub post office on 17 September 1998, he ticked the entries in the balance books for 10 September 1998 and placed his signature thereon falsely indicating that he had actually counted the cash and stocks.

The admission was repeated before the Tribunal where he was legally represented although, in that court, his legal practitioner argued that he ought to have been charged with a lesser offence. This argument was, in my view, correctly dismissed by the Tribunal.

In terms of rule 5 of the Supreme Court (Miscellaneous Appeals And References) Rules 1975 ('the Rules'), a notice of appeal "shall be delivered and filed ….within 15 days of the decision appealed against being given."

In or about May 2003, the applicant, having failed to note an appeal timeously, made an ill-advised application to the High Court for condonation of the late noting of an appeal and an application for extension of time within which to appeal to this Court. It appears, *ex facie* the order of the High Court, that the application was granted by SMITH J on 14 May 2003. Thereafter, on 29 May 2003, the applicant purported to file a notice of appeal in this Court. The said notice was defective in that it did not contain a prayer as required by Rule 7 of the Rules. Further, since appeals to this Court from the Labour Court can only be on a question of law (by virtue of s 92D of the Labour Act [*Chapter 28:01*]), the notice of appeal was null and void, no question of law having been raised therein.

The Registrar having set the matter down for hearing, the applicant appeared by counsel to argue his case in this Court on 10 January 2005 on which date the matter was struck off

the roll, the Court being of the view that the appeal was a nullity. Thereafter, the applicant's legal practitioners waited another two months before filing the present application on 10 March 2005.

It is trite that in an application of this nature, the factors by which the court will be guided are as follows:

- That the delay was not inordinate, having regard to the circumstances of the case;
- That there is a reasonable explanation for the delay;
- The prospects of the appeal succeeding should the application be granted are good; and
- The possible prejudice to the other party should the application be granted. See *Director of Civil Aviation v Hall* 1990(2) ZLR 354 (S) at 357E-G. See also *Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa* 4th ed at p898.

I turn now to consider the application in the light of these factors bearing in mind that each case must be decided on its own particular facts.

The length of the delay and the explanation therefor.

The judgment was delivered some two and a half years ago. On the face of it, therefore, the delay is inordinate.

The applicant blames the delay on the lack of financial resources to employ a legal representative. However, in November 2003, he was assigned his present legal practitioners to act on his behalf *in forma pauperis*. The applicant has not explained his inaction for the 17 months preceding the filing of this application. His legal practitioners were, on their own admission, aware that the order granted by the High Court was a nullity. Yet they made no application to this Court for an

extension of time within which to appeal but were content to appear before this Court to argue the applicant's case despite their knowledge that the appeal was a nullity. When the inevitable happened and the appeal was struck off the roll, one would have expected an application for condonation of the late noting of the appeal and an extension of time within which to appeal to be filed immediately. Instead, the legal practitioners waited for two months before filing this application and no explanation has been given for the delay.

In the words of GUBBAY JA, as he then was, in *Nguruve v Secretary Of The Commission Of Inquiry* 1988 (1) ZLR 244 (SC) at p 248:

> "… to condone such delays would be to adopt too charitable a view. A legal practitioner is expected to be diligent. He is expected to know, observe and follow the procedures laid down by the Rules of the Court. He must use his best endeavours to get it right, and if he gets it wrong at least be prepared to offer some reasonably cogent explanation. It is totally insufficient for him to shroud his errors in silence."

And, in *Director of Civil Aviation v Hall supra*, the following passage from *P E Bosman Transport Works Committee & Ors v Piet Bosman Transport* (Pty) Ltd 1980 (4) SA 794 (A) at 799 D-E was quoted with approval:

> "where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should….not be granted whatever the prospects of success may be."

See also *At The Ready Wholesalers* (Pvt) Ltd t/a *Power Sales v Innocent Katsande & 5 Ors* SC 7/03; *Jaison Kokerai Machaya v Lameck Nkiwane Muyambi* SC 4/05; and *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 at 315 F-H.

In the light of the above, the application has failed the first and second hurdles and could be dismissed at this stage. I nevertheless proceed to examine the prospects of success.

The prospects of success

Appeals to this Court from the Labour Court are on a question of law only. Mr *Katsande*, in an 'amended notice of appeal' attached to the application, gave the following as grounds of appeal and I deal with them in turn.

1. The learned Judge erred in his analysis of the applicant's *mens rea*.

   A perusal of the judgment reveals that the Tribunal proceeded on the basis of an admission by the applicant, who was legally represented, that he had falsified documents. This is a dismissible offence in terms of the applicable Code of Conduct. Once the admission was made, the decision to dismiss the applicant could not be faulted. There was, consequently, no 'analysis of *mens rea*' as Mr *Katsande* put it.

2. The second ground of appeal raised by Mr *Katsande* was that the decision of the Tribunal was irrational because the accounting system of the respondent was flawed.

   The question as to whether the accounting system was flawed was not canvassed in the court below and is being raised for the first time on appeal, a course which is not open to the applicant unless the criteria set out in the following passage taken from

the judgment of KORSAH JA in *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) at 157A, have been shown to be satisfied.

> "Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it was directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G."

There must, in the first place, be a point of law which goes to the root of the matter and, secondly, the consideration of it must not involve unfairness to the other party. Since the issue sought to be raised on appeal is not on a point of law, the applicant has failed to satisfy the first criterion and this ground of appeal cannot be properly be relied upon. Besides, nothing in the decision of the Tribunal strikes me as being irrational. If anything, the decision was based on sound logical reasoning.

3. The final ground of appeal was that the hearing committee was biased.

This ground of appeal, like the second, was raised for the first time in this Court and the question sought to be raised is one of fact. It was never an issue before the Labour Court before whom the applicant was legally represented. Like the second ground of appeal, and for the same reasons, it cannot properly be relied upon by the applicant on appeal.

Accordingly, no valid grounds have been raised in the 'amended notice of appeal' which persuade me that the appeal is properly before this Court in terms of s 92D of the Labour Act; nor has the applicant made any attempt in his affidavit to show that the judgment of the

Tribunal was wrong and that the appeal has reasonable, or any, prospects of success. On the contrary, the applicant acknowledged his error and apologised for it. The punishment imposed on him was that stipulated in the Code of Conduct. The judgment of the Tribunal therefore cannot be faulted.

The possible prejudice to the other party

There must be finality to legal proceedings. See *Ndebele v Ncube* 1992 (1) ZLR 288 (S). The judgment in this matter was handed down almost three years before this application was made and the respondent would have acted upon it, no notice of appeal having been lodged within the time prescribed by the Rules of this Court. It goes without saying that reopening the matter at this stage would be prejudicial to the respondent. It would introduce uncertainty into the affairs of the respondent which would have conducted its business on the basis that there was no appeal and that the matter had reached finality.

In view of the above, I conclude that no basis has been established for the grant of this application and it is hereby dismissed.

Since the applicant is being represented *informa pauperis*, I make no order as to costs.

F M Katsande & Partners, applicant's legal practitioners