

MENDSON MJULUMBA MPOFU
v
NATIONAL SOCIAL SECURITY AUTHORITY

**SUPREME COURT OF ZIMBABWE
HARARE, JANUARY 22, 2015**

The applicant in person

S Bhebhe, for the respondent

GOWORA JA, in chambers in terms of s 92F (3) of the Labour Act.

This is an application for leave to appeal from the Labour Court to the Supreme Court. The applicant was unsuccessful in an application for leave to appeal against a decision of the Labour Court. The judgment which the applicant intended to appeal against was delivered on 18 December 2013. The applicant collected the judgment on 17 February 2014. He made his application for leave to appeal to the Supreme Court before the judge of the Labour Court on 27 March 2014.

The respondent raised two issues *in limine*. Firstly, the respondent argued that the application had been filed out of time. In terms of r 36 of the Labour Court Rules 2006, the application ought to have been filed within 30 days of 18 December 2013, which was the date of the judgment. As such, the respondent argued, there could be no application before the Judge in the court *a quo*. The applicant did not seek condonation for the failure to comply with the Rules

in the making of the application and affirmed his position that he was not out of time. The second point in *in limine* was that there was no draft notice of appeal attached to the applicant's papers and as such, the judge could not assess whether the applicant had indeed raised questions of law or make an assessment on the prospects of success.

In respect of the first point *in limine*, the judge in the court *a quo* found for the respondent and upheld the objection. The learned judge said:

“In this regard the point raised *in limine* is taken. The Applicant failed to comply with Rule 36 of the Labour Court Rules and did not file an application for leave to appeal on time. For that reason alone his application **should not be entertained** as in essence there is no application before the court. The Applicant was to seek condonation. The application is not properly before this court and is hereby dismissed with costs.”(my emphasis)

Clearly this was a dismissal on questions of procedure as opposed to a determination on the merits. Despite the wording of the order, the substance of the judgment shows that the matter was not heard on the merits, as the judge did not delve into the same.

The application for leave to appeal before me was made in terms of s 92F of the Labour Act, which section provides as follows:

“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 party 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.”

The thrust of the above section envisages a situation where the Labour Court has made a determination on the substance of the application for leave to appeal, rather than a dismissal for want of form related to the procedural defects of the application. Consequently, in dismissing the application on the grounds that the application had been brought out of time and in defiance of the provisions of r 36, it leaps to the mind that the learned judge did not enquire into the substance of the matter, and rightly so. The view I take is that the application before the court *a quo* was bedeviled by a procedural defect that it simply could not be heard.

The court *a quo* did not grant or refuse leave, it declined to hear the application for leave. Technically, leave to appeal can only be refused in the context of s 92F where the court has made a value judgment on whether the intended appeal raises question of law or otherwise and where the intended appeal raises question of law, there are no prospects of success attendant to such appeal.

The salient point advanced by the respondent, and properly so in my view, is that the Supreme Court has no jurisdiction to hear an application in terms of s 92F (3) unless:

- (1) An application for leave to appeal to the Supreme has been made before a judge of the Labour Court, and,
- (2) Such application is refused by the judge so seized with the matter.

These requirements are patently conjunctive and the making of an application before the Labour Court without the concomitant refusal to grant it does not suffice. The fact that the court *a quo* declined to hear the application inevitably means no application for leave to appeal was made to it.

In my view the remedy to seek leave before the Labour Court is still available, the dismissal by the judge for want of procedure does not defeat applicant's right to seek leave before it in the appropriate manner. The fact that the remedy is still available before the Labour Court means that this Court cannot be properly seized with this matter at this stage, the result being that the Supreme Court assume jurisdiction where an application on the substantive issue relating to leave to appeal has not been made to the court *a quo*. An application has to be heard on the merits and refused by the Labour Court for a judge of this Court to be properly seized with the application under s 92F (3) of the Labour Act. This Court, being a creature of statute, can only exercise its functions in within the four corners of the enabling legislation. It is not a court of first instance in relation to applications for leave to appeal under s 92F (3) the applicant has not advanced a pertinent reason why it should act contrary to the provisions of the Act.

In the result, there is no application for leave to appeal before me.

The respondent prayed that costs should follow the result in this case. There is no reason why costs should not be awarded against the applicant. He was advised that he needed to make an application for condonation by the court *a quo* before he could be heard in relation to the application for leave to appeal. Regardless of the advice of the court *a quo*, he elected to approach this Court, and improperly so. His recalcitrance has resulted in the respondent being made to bear legal costs. I therefore make the following order:

“The application is struck off the roll with costs.”