

REPORTABLE (44)

PG INDUSTRIES (ZIMBABWE) LIMITED
v
MARK BVEKERWA & 34 OTHERS

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & PATEL JA
HARARE, OCTOBER 17, 2014 & NOVEMBER 17, 2016

T Mpofo, for the appellant

T Katsuro, for the respondents

GOWORA JA: On 1 November 2013, the Labour Court granted a chamber application in favour of the respondents for the amendment of their notice of appeal. This is an appeal against the order granting the application.

THE FACTS

The appellant is a company duly registered in terms of the laws of Zimbabwe. The respondents were formerly employed by an entity known as PG Merchandising Limited trading as PG Timbers (hereinafter referred to as PG Timbers). It is not in dispute that the appellant was the holding company for a number of entities of which PG Timbers was one. PG Timbers has ceased to exist. The exact circumstances thereof are not before the court.

The respondents lost their employment with PG Timbers some time before its demise. It was alleged against the respondents that they had taken part in an illegal collective job action on 30 November 2011. The action was aimed at coercing their erstwhile employer into increasing their wages in line with the recommendations of the National Employment Council. The respondents alleged that after the collective job action they were denied entry into the premises. They applied for a show cause order under the Labour Act [*Chapter 28:01*], the Act, which was dismissed by the relevant Minister.

In the meantime, the employer charged the respondents with contravening s 7.1.4(viii) of the PG Industries (Zimbabwe) Code of Conduct, (“the Code”) “for participating in an unconstitutional industrial action”. They were served with notices to attend disciplinary hearings before the disciplinary committee. The respondents deliberately boycotted the process. They were convicted *in absentia*. They were all dismissed from employment upon conviction.

Section 10.1 of the Code requires that an aggrieved employee seek leave to appeal internally within six working days of the date of the decision sought to be appealed against. The respondents only sought leave after a period of three months. Subsequent to the noting of the application for leave, they made an application for condonation for the late noting of the application for such leave. The appeals committee before whom the condonation was sought was chaired by Caroline Mapupu, the appellant’s Group Human Resources Executive. On 22 May 2012, the committee handed down its decision dismissing the application for condonation.

The respondents were aggrieved by the dismissal of the application and noted an appeal with the Labour Court on 17 June 2012. The form LC 3 which constituted the

notice of appeal cited the appellant as the respondent. Attached to the form LC 3 were grounds of appeal wherein the respondent was cited as PG Timbers.

The appellant raised a preliminary point in its notice of response. It pointed to the citation of two different respondents on the form LC 3 and the grounds of appeal. The manner of citation created confusion as to which respondent was being brought to the Labour Court on appeal. Consequently the identity of the respondent as employer was critical in the determination of the appeal. The respondents were put on notice to properly identify the correct respondent to the appeal.

No action was taken by the respondents and on the date of hearing the appellant raised the preliminary point with the court. The respondents argued that the citation of different parties on the documents was a mere technicality which could not stop the court from delving into the merits of the dispute. On 2 August 2013 the court *a quo* handed down its judgment. It held that the respondents had made an error in citing the two entities in the manner they did. The court held that the error could be corrected and ordered the respondents to make an appropriate application for amendment of the notice of appeal and grounds thereof.

On 13 September 2013, the respondents filed a chamber application for amendment of the notice and grounds of appeal. In both documents the appellant was cited as the respondent. The record indicates that the application was served on the appellant's legal practitioners. The application was opposed by the appellant. On 11 November 2013 the application was granted in chambers. There is no indication that the parties appeared before the learned judge before the order was granted. No reasons for the order were made available to the parties.

THE APPEAL

The appellant was aggrieved and, with the leave of the court *a quo*, it has noted an appeal against the order of 11 November 2013. The ground upon which the appeal is premised is captured as follows:

“The court *a quo* erred by granting the amendment by the respondents, which amendment has the effect of making the appellant a party to the employment dispute in question yet the appellant has never at all material times been the respondents’ employer. Accordingly, the appellant has been wrongly cited as a party to the dispute.”

Mr *Mpofu* contended before us that the absence of reasons for the judgment constitute an irregularity such as to justify interference with the judgment of the court *a quo* by this court. I agree. In *Muchapondwa v Madake & Ors* 2006(1) ZLR 196(H), KARWI J said:¹

“The issue to be decided is whether or not an appeal is invalid if it is noted without the appellant having requested in writing and being furnished with the reasons for a judgment or order. I do not agree with the submission by *Mr Magwaliba* that such an appeal is a nullity. I equally do not agree with *Mr Magwaliba’s* assertion that a judicial officer is not under obligation to provide reasons for his judgment or order. It is settled that:

‘When a matter is opposed and the issues have been argued it is unacceptable for a court to make an order without giving any reasons for it, since the litigants are entitled to be informed of the reasons for the decision.’”

See *Herbstein and Van Winsen Civil Practice of the Supreme Court of South Africa*.²

The rationale for the above was set out in *Botes & Another v Nedbank Ltd* 1983 (30 SA 27(A) at 27H:

¹At 200D-H.

²Vol 1 4ed p 679

“The first is that the judge who heard the exception and application to strike out made orders dismissing the exception and allowing, in part, the motion to strike out without giving any reasons. In my view, this represents an unacceptable procedure. In a case such as this, where the matter is opposed and the issues have been argued, the litigants are entitled to be informed of the reasons for the judge’s decision. Moreover, a reasoned judgment may well discourage an appeal by the loser. The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as has happened in this case, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did.”

A court is obliged to give reasons for its judgment to inform the parties on its reasons for the decision. A failure to give reasons is an irregularity which has the effect of vitiating the proceedings. The Labour Court considered an application for leave to appeal against that judgment to this court. Notwithstanding its knowledge of the intent of the appellant to note the said appeal, the Labour Court has to date not provided reasons for its order. Mr *Mpofu* submitted that in light of the irregularity, this court should exercise its powers of review in terms of s 25 of the Supreme Court Act [*Chapter 7:13*]. Section 25 reads:

“25 Review powers

- (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.
- (2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.
- (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination.

Due to the irregularity, the appeal cannot be decided on its merits. The absence of reasons makes the task of the court even more difficult as the reasons for the decision remained locked in the mind of the judicial officer. See *S v Makawa* 1991(1) ZLR 142(S), at 146D-E.

In the exercise of its review powers this court finds that it is in the interests of justice that the judgment be set aside.

In terms of s 25(2) this court is imbued with powers to set aside proceedings that are irregular even if those proceedings are not the subject of an appeal or application before the court. I am fortified in this view by the remarks of ZIYAMBI JA in *The Chairman Zimbabwe Electoral Commission & 2 Ors v Roy Bennet & Anor* SC 48/05, as follows:

“Section 25(2) confers additional jurisdiction which may be exercised when it comes to the notice of the Supreme Court or a judge of that court that an irregularity has occurred in proceedings not before it on appeal or application. Thus s 25(2) deals with irregularities in respect of which no appeal or application is before the Supreme Court and the review is undertaken at the instance of the Supreme Court and not of any litigant.”

In *Zimasco v Marikano* SC 6/14, GARWE JA made remarks that are apposite and pertinent to this principle at p 8 of the cyclostyled judgment to the following effect:

“In other words the Supreme Court has the power of review over matters coming before it for adjudication by way of appeal or whenever it comes to the notice of the court that an irregularity has occurred in any proceedings or in the making of a decision and it is felt that such an irregularity should not be allowed to stand.”

I turn now to the substance of the appeal itself.

THE ISSUES RAISED AND THE DISPOSITION THEREOF

The sole ground of appeal complains that the granting of the amendment reflecting the appellant as the respondent to the dispute had the effect of turning the appellant,

instead of PG Timbers, into the respondent's employer. In view of the finding of irregularity in the proceedings it is not intended to go into the merits of that submission. What is however of import is how the application came about.

In its judgment of 2 August 2013, the court *a quo* ordered that an application be made to rectify what the court termed was an irregularity in the manner in which the two entities had been cited. The said irregularity being referred to by the court arose as a result of a point in *limine* raised by the appellant on its improper citation on one of the documents constituting the notice of appeal. The learned judge did not determine the point in *limine*, choosing instead to order the respondents to amend their notice of appeal.

Two issues arise immediately. The first is that the court failed to deal with and determine an issue that had been raised before it. The point in *limine* was to the effect that due to the irregularity in the citation of the respondent to the appeal, there was in fact no respondent before the court. The preliminary point raised was such that the court could not dispose of any issue in relation to the matter without making a finding on the point. The court could not simply wish it away as a non-issue. It had to make a determination. In my view, the failure to deal with an issue raised is an irregularity that can serve to vitiate the proceedings.

The position is settled that where there is a dispute on a question, be it on a question of fact or point of law, there must be a judicial decision on the issue in dispute. The failure to resolve the dispute vitiates the order given at the end of the proceedings. Although the learned judge may have considered the question as to whether or not there was an irregularity in the citation of the employer, there was no determination on that issue. In the

circumstances, this amounts to an omission to consider and give reasons, which is a gross irregularity.

The second issue is that the court fashioned a remedy on behalf of one of the parties and ordered that party to take a procedural step which had neither been sought nor prayed for. Nor had the court been addressed by any of the parties on the order it ultimately issued.

The court *a quo* made a finding that the appellant had proceeded to address the merits of the appeal before it despite denying a relationship with the respondents. The court concluded that the citation of the appellant and PG Timbers in this case was a mere technicality. It opined that it was an error that could be corrected by an application for amendment of the papers.

Mr *Mpofu* argued that the corporate veil could not have been uplifted at this stage of the proceedings. I agree. The effect of the order of 2 August 2013 is to uplift the corporate veil and turn the appellant into the employer of the respondents. The Labour Court is a creature of statute and can only do that which it is empowered to do by the Act. It has no jurisdiction to uplift the corporate veil. Its order for the amendment of the employer *in casu* to reflect the appellant was in effect a decision on an enquiry into which of the two entities was the respondents' employer. That enquiry is an irregularity on the grounds of absence of jurisdiction. Consequently the order cannot stand.

As already stated above, this court has the power to exercise the same review powers as the High Court. Consequently, if it comes to the notice of this court that an

irregularity has occurred in any proceedings or in the making of an order, it is appropriate for this court to review the proceedings or decision in question.

The failure to determine the point *in limine* and the order granted pursuant to that failure constitute gross irregularities warranting interference by this court. As a consequence, the order amending the citation of the parties and substituting the appellant for PG Timbers cannot stand as it is based on a nullity. It follows therefore that it must be set aside. The orders dated 2 August 2013 and 11 November 2013 respectively must be set aside.

In the premises, the appeal succeeds and an order will issue as follows:

IT IS ORDERED THAT:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* under Case No LC/H/413/12 dated 2 August 2013 be and is hereby set aside.
3. The matter is remitted to the court *a quo* for determination.
4. The judgment of the court *a quo* under Case No LC/H/413/12 dated 11 November 2013 be and is hereby set aside and substituted with the following:

“The chamber application for the amendment of the citation of the parties to the dispute is struck off the roll with no order as to costs.”

GWAUNZA JA: I agree

PATEL JA: I agree

Mawere & Sibanda, appellant's legal practitioners

Munyaradzi Gwisai & Partners, respondents' legal practitioners