

REPORTABLE (28)

RESERVE BANK OF ZIMBABWE
v
(1) T. LLOYD MUFUDZI (2) RICHARD USEYA (3) NYASHA
CHIKAZAZA (4) WARAIIDZO TANDI

SUPREME COURT OF ZIMBABWE
GOWORA JA, BHUNU JA & ZIYAMBI AJA
HARARE, JUNE 26 2017

V. Mukwachari, for the appellant

T. Marume, for the respondents

ZIYAMBI AJA:

[1] This is an appeal against a judgment of the Labour Court dismissing an application for condonation of the late filing of an application for leave to appeal to the Supreme Court.

[2] It arises from the facts set out briefly hereunder. The appellant, in 2010, embarked on a retrenchment exercise which affected the respondents, among others. Following the usual negotiations with the works council, a retrenchment agreement was concluded between the appellants' and the respondents' representatives on 8 December 2010. Thereafter pursuant to this agreement each respondent was requested to, and did, sign an 'Acknowledgement Form' containing the agreed terms of the retrenchment. With specific reference to motor vehicles and lap tops, the agreement provides:

“Vehicle +5years – Drive out
-5years - Calculated at book value

Laptop Take out at book value”.

Certain items like housing and clothing allowances were provided for in the following terms:
“...Housing Allowance – in terms of Bank Policy.
Clothing Allowance – in terms of Bank Policy.”

[3] The above notwithstanding, the appellant refused to avail the vehicles and laptops to the respondents reasoning that in terms of the respondents’ contracts of employment they were not entitled to the same. The dispute was referred to arbitration and the Arbitrator ruled in favour of the respondents.

The appellant’s appeal to the Labour Court was dismissed on 24 October 2012. The judgment is date stamped 30 November 2012. In terms of the Labour Act¹ an appeal on a point of law only lay, with leave, to the Supreme Court. Any application for leave was to be made within 30 days of the date of the judgment.² No application was filed within that period.

[4] On the 11 September 2013, the appellant filed an application for condonation of the late filing of an application for leave to appeal to the Supreme Court. The reason for the delay was said to be the failure of the office of the Registrar to notify the appellant or its legal practitioners of the delivery of the judgment. No explanation was given by the appellant as to how it eventually became aware of the judgment. The learned Judge found the delay to be inordinate and the explanation for the delay unreasonable. Regarding the prospects of success, the learned Judge after considering the contents of the retrenchment agreement as set out in the ACKNOWLEDGMENT FORM as read with the judgment sought to be appealed against concluded:

¹ [Chapter 28:01]

² Labour Court Rules 2006, Rule 36

“It is, in my view, unlikely that an appeal court will interfere with the findings and conclusions reached in this matter, based on the clear and unambiguous contents of the retrenchment agreement.”

An application for leave to appeal against this judgment was dismissed by the Labour Court but subsequently granted by this Court.

THE APPEAL

[5] The first ground of appeal alleged an error at law by the court *a quo* in finding that the delay was inordinate and the explanation therefor unreasonable. The second alleged a misdirection at law by that court in ruling that the appellant had no prospects of success on appeal in the main matter.

[6] The appeal runs foul of two legal principles. The first is s 92F(1) of the Labour Act³ which provides that an appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court. The second is that the indulgence of condonation is granted or denied at the discretion of the court of first instance and an appellate court will not, except in limited circumstances⁴, interfere with the exercise by the lower court of that discretion.

[7] Regarding the first ground of appeal, merely using the words ‘erred in law’ does not create a point of law. It must clearly appear from the ground of appeal what point of law is sought to be determined.⁵ In that connection it has been held that a serious misdirection on the facts would amount to a question of law.⁶ A finding that the delay in making an application is

³ Chapter 28:01

⁴ See *Barros & Anor v Chimphonda* 1999 (1) ZLR58 (S)

⁵ *Small Enterprises Development Corporaton v David Chemhere* SC23/02;

⁶ *National Foods v Mugadza* SC 105/1995; *Hama v National Railways of Zimbabwe* SC 96/1996

inordinate and the explanation for the delay unreasonable, is a factual finding⁷. Such a finding does not qualify as a point of law unless it is grossly unreasonable, that is, unless it is a finding that no reasonable court faced with the same facts would have made. No allegation of gross unreasonableness has been made nor is any apparent on the record. Accordingly, this ground of appeal, not being on a point of law, is invalid.

[8] As to the second ground of appeal, it is vague and embarrassing, to say the least. The appellant has not indicated in this ground of appeal what point of law is to be determined on appeal. A finding that there are no prospects of success on appeal was made by the court *a quo*. Simply to allege a ‘misdirection in law’ by the court without alleging the nature of the misdirection does not advise this Court of the point of law on which its decision is required. The second ground of appeal is also invalid in that it does not disclose a point of law.

[9] In any event, condonation is an indulgence granted at the discretion of the court of first instance and is not a right obtainable on request. In an application for condonation, a court considers, among other things, the length of the delay, the reasonableness of the explanation for it, the prospects of success, and the need for finality in litigation. Here, the delay was found to be inordinate, the explanation proffered for the delay unreasonable and the prospects of success non-existent.

[10] Where a discretion has been exercised and a decision arrived at by a court of first instance the principles enunciated in *Barros and Anor vs Chimphonda*⁸ are applicable. They were stated by GUBBAY CJ as follows:

⁷ *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR217 (SC); *Vimbai Mbisva v Rainbow Tourism rop Limited T/A Ranbow Hotel & Towers* SC 32/09; *Leopard Rock Hotel Company (Pvt) Ltd v Van Beek* 2000 (1) ZLR 251 (S) at 256 B-C; *Chinyange v Jagers Wholesalers* SC 24/03

⁸ *Supra* at para [6]

“It is not enough that the Appellate Court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. 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, if it does not take into account some relevant consideration, then its determination should be reviewed, and the Appellate Court may exercise its own discretion in substitution...”⁹

[11] The judgment of the court *a quo* is well reasoned. The learned Judge carefully assessed all the relevant factors. Nothing was alleged, or proved, to justify interference by this Court with the judgment of the lower court.

[12] It is for the above reasons that, after hearing submissions by counsel, the appeal was dismissed with costs.

GOWORA JA: I agree

BHUNU JA: I agree

T H Chitapi & Associates, Appellant’s Legal Practitioners

Matsikidze & Mucheche, Respondent’s Legal Practitioners

⁹ At pp 62F-63A.