

REPORTABLE (4)

(1) ITYAI NKOMO (2) THEMBINKOSI NYATHI
(3) NICHOLAS KHUMBULA TSHILI

v

T. M. SUPERMARKETS (PRIVATE) LIMITED

**CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, OCTOBER 23, 2018 & FEBRUARY 27, 2019**

The applicants in person

P Ncube, for the respondent

Before: MALABA CJ, In Chambers

This is an application for leave to appeal to the Constitutional Court in terms of r 32 of the Constitutional Court Rules, 2016 (“the Rules”).

The background to the matter is aptly captured in the Supreme Court judgment which is the subject of the intended appeal. The applicants were employed as section managers by the respondent at T.M. Supermarket, Lobengula Street, in Bulawayo. In 2011 the applicants became aware that other section managers at other branches were being paid higher salaries than themselves. They wrote letters to the Managing Director and the Human Resources

Officer concerning the issue, but did not receive any response. In 2012 they lodged a complaint of an unfair labour practice with a labour officer emanating from the alleged salary differences. They sought back-pay from January 2010 to September 2011 with interest. The respondent explained that there was a performance based salary structure in place, which explained the differences noted by the applicants. The matter went through conciliation and a certificate of no settlement was issued.

The matter was referred to arbitration, with one term of reference being whether or not the applicants were entitled to back-pay and, if so, the *quantum* thereof. The arbitrator found the decision to put in place and implement the performance based salary system to be in contravention of the *audi alteram partem* rule, as the applicants had not been heard concerning the system. He found further that the respondent had committed an unfair labour practice by underpaying the applicants. Consequently, he ordered that each of the applicants was entitled to back-pay in the sum of US\$2 390.

Aggrieved by the decision of the arbitrator, the respondent appealed to the Labour Court on two grounds. The first was that the arbitrator had erred in finding that the respondent had committed an unfair labour practice by implementing the performance based salary scheme without giving the applicants the opportunity to be heard. The second ground of appeal was that the arbitrator exceeded the terms of reference by ordering the respondent to normalise its remuneration system. The Labour Court dismissed the appeal, finding that the respondent had indeed committed an unfair labour practice by not apprising the employees of the introduction of the performance based salary system. It disposed of the second ground by finding that it was ill-judged, since the respondent had already started a process of regularising its remuneration system.

The respondent sought and was granted leave to appeal to the Supreme Court. It filed a notice of appeal containing the following grounds -

1. The court *a quo* erred in law in effectively coming to the conclusion that it was unlawful for the appellant (now the respondent) to pay its employees performance based salaries.
2. Having come to the conclusion that what the respondents (now the applicants) were being paid was in accordance with their contracts of employment, the court *a quo* erred in law in holding as valid an award which entitled them to be paid on a salary scale that was not contractual and which related to different employees.
3. The court *a quo* erred in failing to make a determination on whether the arbitrator was entitled to stray from the terms of reference in the manner he had done and whether he was at large to afford relief which had not been motivated.

The court *a quo* determined the matter on the basis of two issues -

1. Whether the court *a quo* erred in holding that it was unlawful for the appellant (now the respondent) to pay its employees performance based bonuses.
2. Whether the court *a quo* erred by failing to make a determination on the question of whether or not the arbitrator strayed from his terms of reference.

The court *a quo* upheld the Labour Court's finding that the performance based salary scheme put in place by the respondent was illegal because the applicants had not been given an opportunity to be heard before its implementation. It went on to find, however, that the

Labour Court had erred in ordering the enforcement of the decision of the arbitrator on back-pay. The court *a quo* held that the Labour Court and the arbitrator were enforcing an illegal payment.

On the second ground of appeal, the court *a quo* held that the term of reference before the arbitrator was whether or not the applicants were entitled to back-pay. It held that the order made by the arbitrator for the regularisation of the respondent's salary system was without basis as it was outside the term of reference. The court *a quo* held that the Labour Court had not addressed its mind to the resolution of the issue, as it was of the view that the matter had been overtaken by events.

The appeal was allowed with costs and the judgment of the Labour Court set aside.

The applicants seek leave to appeal against the judgment of the court *a quo*. The contention is that the court *a quo* delivered a judgment which dealt with a performance based bonus scheme and not the performance based salary system which was the dispute between the parties. The applicants alleged that the matter they brought before the labour officer was premised on a complaint that the respondent was paying a higher basic salary to other section managers to their exclusion. They alleged that the court *a quo* dealt instead with the payment of a performance based bonus. The contention was that the court *a quo* infringed the rights of the applicants enshrined in s 56(1) (equal protection of the law), s 65(1) (to be paid a fair and reasonable wage) and s 65(4) (just, equitable and satisfactory conditions of work) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 ("the Constitution"). The applicants contend that the court *a quo* failed to appreciate the issue before it.

The respondent opposed the application. It contended that there was no constitutional matter upon which the intended appeal would be predicated. The respondent based the contention on the reading of r 32 of the Rules in terms of which the application was purportedly brought. Mr *Ncube* argued that the rule requires that there ought to have been a constitutional matter adjudicated upon by the court *a quo* for an appeal to lie to the Court. Reliance was placed on the authority of *The Cold Chain (Private) Limited t/a Sea Harvest v Robson Makoni* CCZ 8/17 to highlight the fact that the Court has emphasised the need for an appeal from a subordinate court to be predicated on a decision on a constitutional issue. A person has no right of appeal against a decision of a subordinate court on a non-constitutional issue. Section 169(1) of the Constitution provides that the Supreme Court is the final court of appeal for Zimbabwe except in matters over which the Constitutional Court has jurisdiction.

In *Rushesha & Ors v Dera & Ors* CCZ 24/17 at pp 10-11 of the cyclostyled judgment, the Court emphasised the fact that there is no right of appeal from a subordinate court on a non-constitutional matter. GWAUNZA JCC (as she then was) said:

“Only where the Supreme Court determines a constitutional issue, may one appeal to this Court for a final determination. Because the Supreme Court in this matter did not determine any constitutional issue, the decision it rendered was final and not appealable. Since courts are not expected to, and invariably do not, render judgments that cannot be put into effect - which are in other words a *brutum fulmen* - a purported appeal against the effect of a judgment of the Supreme Court on a non-constitutional issue is in reality an appeal envisaged in s 169(1). That is, a final judgment that is not appealable no matter how well disguised any such purported appeal may be. It does not escape notice that in seeking to have the Supreme Court judgment overturned under the guise of an appeal to this Court, the appellants are, in effect, attempting to revive, and reinstate, the judgment of the High Court, which was in their favour. What is sought would be both manifestly irregular, and bad at law.” (my emphasis)

The applicants approached the labour officer with a dispute relating to salaries. The dispute arose from the allegation that other section managers were being paid a higher salary than the applicants.

The matter for determination by the court *a quo* related to the same subject of the dispute that had engaged the parties in proceedings before the Labour Court. The dispute was about the legality of the alleged performance based salary scheme, which the applicants said was being beneficially applied to other section managers to their exclusion. The subject of the dispute before the subordinate court for determination was a labour matter, which called for the interpretation and application of the principles of labour law. The court *a quo* decided a labour matter. The non-constitutional issue did not become a constitutional matter because the applicants made a decision on it a matter of an application for leave to appeal to the Court.

No statement setting out clearly and concisely the constitutional matter raised in the decision of the court *a quo* was filed with the application, as required by r 32(3)(c) of the Rules. The founding affidavit supporting the application did not verify the cause of action as arising from a decision of the court *a quo* on a constitutional matter. The applicants could not have complied with the requirements of the procedure of an application for leave to appeal from a decision of the court *a quo* prescribed by the Rules, because the decision sought to be appealed against was not on a constitutional matter.

The inevitable effect of a finding of the fact that the court *a quo* did not decide a constitutional matter is that the applicants have no right of appeal to the Court against the decision of the court *a quo*.

In *Nyamande and Another v Zuva Petroleum* 2015 (2) ZLR 351 (CC) at 354B-C ZIYAMBI JCC said:

“Having considered the submissions by the parties I agree with Mr *Chagonda* that the applicants have not established any right to approach the Constitutional Court by way of appeal. Section 167(5) relates to rules of procedure regulating the manner of approach to this Court on appeal from lower courts. It does not confer a right to

appeal to the Constitutional Court on a litigant who has no right of appeal. ... Failing that, a right of appeal could only arise where the Supreme Court makes a decision on a constitutional matter. ...

Since no constitutional issue was determined by the Supreme Court, no appeal can lie against its decision It follows that the applicants have not established a right of appeal to the Constitutional Court and any appeal filed in this matter by the applicants is a nullity as it conflicts with the provisions of s 169(1) of the Constitution.” (My emphasis)

An application for leave to appeal to the Court against a decision of a subordinate court on a non-constitutional issue would be seeking from the Court relief, the granting of which would be a nullity for violation of s 167(1)(b), as read with s 169(1), of the Constitution.

DISPOSITION

The application is dismissed with costs.

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

Coghlan & Welsh, respondent's legal practitioners