

REPORTABLE (115)

GERSHOM MUBINGI
v
THE ZIMBABWE BATA SHOE COMPANY

SUPREME COURT OF ZIMBABWE
HARARE: 11, 12 & 24 JULY 2023 & 30 OCTOBER 2023

Applicant in person

E. Mandipa, for the respondent

IN CHAMBERS

UCHENA JA:

Judgment No 115/23

[1] This is a chamber application for leave to appeal against a Chamber Application No SCB 11/23 in terms of r 43 of the Supreme Court Rules, 2018.

BACKGROUND

[2] The background to this application can be summarized as follows:

[3] The applicant was the respondent's employee since 1993. In 2012 the applicant was dismissed from employment after being charged for being absent from duty without leave and fraud. A disciplinary hearing was conducted in September 2012 after which the applicant was dismissed from employment.

[4] Aggrieved by the respondent's decision, the applicant noted an appeal against his conviction and dismissal to the respondent's appeals authority. It is alleged that the appeal was never heard. The applicant alleged that despite making numerous follow ups, on his own and with the assistance of officials from the respondent's worker's committee the appeal was never heard. In 2021 the applicant wrote to the Workers Committee and Work's Council about the appeal. The applicant contends that despite approaching the respondent on numerous occasions and at times in the company of representatives of the respondent's Worker's Committee, the respondent persistently refused to give him audience. The issue was pursued by several Workers Chairpersons as narrated by Ms Enireta Chikazhe in para 5 of her supporting affidavit where she said:

“5. When I was elected to the position of the Workers' Committee chair person in 2021 I was appraised by my predecessors of the pending appeal noted by the applicant sometime in September 2012.”

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[5] In paragraphs 6 to 13 Ms Chikazhe narrated her involvement in the applicant's appeal with respondent's management as follows:

- “6. I would continuously engage management on the need to dispose of the applicant's appeal in accordance with the code of conduct but management could only make unfulfilled promises to consider the appeal.
7. On the 18th day of May 2021 the applicant brought a letter of enquiry to the respondent's business premises in which the applicant petitioned both the Workers' Committee and the Works' Council on the position of his appeal that has been pending before the respondent from September 2012 to date.
8. I accordingly accompanied the applicant to lodge his petition and enquiry with Mr Bundo as the office of first instance. The said Mr Bundo referred us to Mr Shava the Human Resources Manager.

9. However the Human Resources Manager was dismissive of the applicant's petition and enquiry in the result turning him away.
10. On the 11th day of January 2022 the applicant wrote another letter to the respondent and copied the same to the Workers' Representative Committee making a further inquiry into the determination of his appeal that is pending since October 2012. I accepted service on behalf of the Workers' Representative Committee.
11. Further deliberations with the respondent's management were fruitless as the same was adamant that the applicant had been dismissed from employment even in the absence of an appeal hearing.
12. I can confirm that on the first day of February 2022 I advised the applicant that it was the respondent's position communicated to me through Mr Shava and Mr Bundo the Human Resources personnel that he had been dismissed from his employment and that it was the respondent's contention that if he had any reservations as regards the 'dismissal Chamber Application No SK B11/23' 'wherever he pleases' **Judgment No 115/23**
13. I submit that the applicant was never invited to an appeal hearing since the year 2016 when I joined the respondent in utter disregard of the provisions contained in the operative code of conduct."

It was after the applicant had gone through what was narrated by Ms Chikazhe that he applied for review to the Labour Court against the respondent's decision to dismiss him verbally through a third party without hearing his appeal.

- [6] In his application, the applicant argued that the respondent's conduct was in direct contravention of its Code of Conduct. He also submitted that the respondent's actions were substantively and procedurally unfair. He further contended that by failing to hear his

appeal the respondent had violated his right to be heard and as such he sought a review of the proceedings by the Labour Court.

[7] The respondent opposed the application and raised preliminary points to the effect that the application had been filed out of time and as such the applicant ought to have sought for condonation first. It further contended that the application had prescribed since it had been filed 10 years out of time and that it was also filed prematurely since the appeal was still pending. On the merits, the respondent contrary to its earlier position that the appeal was still pending argued that the applicant never filed an appeal against his dismissal and as such there was no basis for the review proceedings.

[8] The court *a quo* dismissed the respondent's preliminary points on the basis that there was no proof on record showing when the appeal had been heard which therefore meant that the court could not say the application was out of time. **Judgment No 115/23**
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appeal before the respondent since it had dismissed the respondent and as such the review application was properly before it. The court also found that there could be no allegation of prescription when the respondent had not shown the court proof of when the applicant's appeal had been finalized. It therefore proceeded to hear the application on the merits.

[9] After hearing the review application on the merits the court *a quo* found that the applicant had failed to state the specific code he was referring to and the provisions therein which made his grounds of review vague and embarrassing. It also found that there were some irregularities with the applicant's alleged application for review given the fact that he had waited for ten years to inquire about its determination when he could have approached the court for assistance. It further found that the applicant ought to have employed the

appropriate remedies to ensure the determination of his appeal by the respondent. In the result, it dismissed the applicant's application for review.

[10] Following the court *a quo*'s decision, the applicant unsuccessfully applied to the Labour Court for leave to appeal to this Court. He thereafter applied for leave to appeal in this Court which application was struck off the roll by a judge of this Court in chambers after the applicant failed to comply with the rules of this Court relating to the filing of proof of service. His application was deemed abandoned and dismissed. The applicant applied for condonation and reinstatement of the application for leave to appeal which was granted by MWAYERA JA on 21 June 2023. It is against this background that the applicant is pursuing his application for leave to appeal against the judgment of the court *a quo*.

ISSUES

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[1 1] Taking into consideration the recent reinstatement of this application by Mwayera JA, in which issues of delay and the explanation thereof should have been considered there is no need to reconsider and determine those issues. It is my view that two issues arise for determination namely:

1. Whether the intended appeal is on questions of law.
2. Whether or not the applicant has prospects of success on appeal.

Whether the intended appeal is on questions of law.

[12] In terms of s 92F (1) an appeal from the Labour Court [*Chapter 28:01*] can only be on

questions of law. It is therefore necessary to determine whether the intended grounds of appeal raise questions of law. This Court cannot grant leave to appeal if the intended appeal does not comply with s 92F (1) which provides as follows:

“(1) An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court.”

[13] A reading of the applicant’s intended grounds of appeal establish that he intends to appeal against the court *a quo*’s findings of law. In summary his grounds of appeal attacks the court *a quo*’s decision as follows:

1. That the court *a quo* determined the application for review on an issue which had not been placed before it by any of the parties and without asking the parties to address it on that issue.
2. That the court *a quo*’s judgment on the application for review is so grossly unreasonable that no other court could have rendered it in the manner the court *a quo* did. And
3. That the court *a quo*’s judgment disregard the evidence placed before it.

I am therefore satisfied that the intended appeal is on questions of law.

WHETHER OR NOT THE APPLICANT HAS PROSPECTS OF SUCCESS ON APPEAL.

[14] In an application for leave to appeal an applicant must prove that he has good prospects of success in the intended appeal. In the case of *Chikurunhe v Zimbabwe Financial Holdings* SC 10-08 this Court held that:

“The party seeking leave must show *inter alia* that he has prospects of success on

appeal. In other words, leave is not granted simply because a party has sought such leave.”

[15] The applicant submitted that he has reasonable prospects of success on appeal in view of the fact that the court *a quo* went on a frolic of its own in finding that he had failed to make specific reference to the code he was referring to in circumstances where the respondent had not raised an issue regarding that issue and the court had not invited the parties to make submissions on it. The applicant argues that the court *a quo* initially found that his grounds for review were in terms of the rules when it dismissed the respondent’s preliminary points but on the merits misdirected itself when it held that the same grounds for review were vague and embarrassing. The applicant also takes issue with the court’s finding that he had waited for ten years before filing the application for review in circumstances where the court itself had **Judgment No 115/23 Chamber Application No SCB11/23** on record showing that the applicant had made inquiries about the appeal in 2016 and there was no evidence as to when the appeal had been determined. A reading of the court *a quo*’s judgment on preliminary issues raised by the respondent confirms that in Judgment No LC/MD/23/2022 the court *a quo* found in favour of the applicant on the basis referred to by him. A reading of judgment No LC/MD/40/2022 confirms that the same judge made findings contrary to those she had previously made in LC/MD/23/2022.

[16] Mr *Mandipa*, for the respondent argued that the applicant has no prospects of success on appeal as the court *a quo* did not alter its judgment in any way. He argued that the court never found that the applicant had been pursuing his appeal but that there was no evidence on record of when the appeal had been finalised. He further submitted that the applicant’s

grounds for review failed to address the Code of Conduct which the applicant argued had been violated and as such there could be no prospects of success on appeal.

[17] A perusal of the record establishes that the basis for the applicant's application for review was to challenge the respondent's conduct in respect of his alleged dismissal without a hearing of the appeal. The applicant took issue with the substantial and procedural fairness of the respondent's conduct regarding his case particularly its failure to hear and determine his appeal. It was therefore the responsibility of the court *a quo* to determine whether or not the respondent had heard and determined the applicant's appeal and procedurally terminated his employment.

[18] It is a cardinal rule in our law that litigants ought to be treated fairly and in accordance with lawful procedures. This is especially so in respect of litigants who are proceeding by doing their best without knowledge of the law and can easily be taken advantage of by the other party. The principles of natural justice embody fundamental notions of procedural fairness and justice. In essence, natural justice requires that the parties who will be affected by the tribunal's or court's decisions receive a fair and unbiased hearing from it.

[19] The principles of justice provide that the party or parties involved in the dispute should be given an opportunity to present their cases before the administrative decision-maker before he/she determines the case. The other principle requires that all administrative decision-makers should be impartial and unbiased in their deliberations.

[20] It seems that the court *a quo* in determining the applicant's application for review did not interrogate the real issue placed before it, which was whether or not the respondent determined the applicant's appeal and had terminated his employment in a substantially and procedurally fair manner. It can reasonably be argued on appeal that the court *a quo* misdirected itself by dismissing the review application on the basis that the applicant had failed to indicate the specific code he was referring to and the provisions therein. The court ought to have given the applicant and the respondent an opportunity to address it on the alleged provisions of the Code of Conduct the applicant argued had been violated before making a decision on whether or not the Code had been violated instead of relying on procedural irregularities. It is trite that labour cases should not be determined on technicalities.

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[21] In the case of *Dalny Mine v Banda* 1999 (1) ZLR 276 (Chamber Application No SCB11/23) determining labour matters on technicalities said:

“As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right.”

[22] This point was further articulated in the case of *Nyahuma v Barclays Bank of Zimbabwe* SC 67/05 wherein the court held as follows:

“...it is not all procedural irregularities which vitiate proceedings. In order to succeed in having the proceedings set aside on the basis of a procedural irregularity it must be shown that the party concerned was prejudiced by the irregularity.”

[23] In this case, it seems to me, that the court *a quo* in dismissing the application on the basis that the applicant had not specified the code he sought to rely on, and that his grounds for

review were vague and embarrassing, failed to apply the law fairly and equitably in order to ascertain whether the applicant's termination of employment by the respondent without the hearing of his appeal was in terms of the law. I am satisfied that the applicant's intended appeal has prospects of success. Leave to appeal should therefore be granted.

It is accordingly ordered as follows

1. The application for leave to appeal be and is hereby granted.
2. The Notice of Appeal shall be filed within 15 days of the date of this order.
3. The respondent shall pay the applicant's costs.

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Mutatu & Mandipa Legal Practitioners, respondent's legal practitioners