

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO.LC/H/365/23

HARARE, 26 OCTOBER, 2023

CASE NO. LC/H/64/23

AND 15<sup>th</sup> DECEMBER 2023

In the matter between:-

CBZ BANK LIMITED

APPELLANT

V

SAIMON MABHUGU

1<sup>ST</sup> RESPONDENT

And

THE APPEALS OFFICER  
PAUL CHIMUDZI NO.

2<sup>ND</sup> RESPONDENT

Before the Honourable Chivizhe J

For Applicant: Mr. Nyangura with Mr. P.C. Fanti (Legal Practitioner)

For Respondent: Ms. H. Madzongwe (Legal Practitioner)

**CHIVIZHE, J:**

This is an application for leave to appeal against an order handed down by this court on 28<sup>th</sup> December, 2022. The application is premised on **Section 92 (F)(2) of the Labour Act [Cap 28:01]** as read with **Rule 43 of the Labour Court Rules, 2017**. The application is opposed.

**POINT OF LIMINE**

On the date of the hearing Ms Madzongwe, for 1<sup>st</sup> Respondent, persisted with a point in *limine* as taken through the 1<sup>st</sup> Respondent's Notice of Response. The point was that the application was fatally defective as there was no judgement attached to the application for leave to the Supreme Court. The point was vigorously opposed by Applicant Counsel. Mr Fanti, for the Applicant, submitted that the court had handed down an order in the matter on 28<sup>th</sup> December 2022. The Applicant had requested for written reasons but up to the time of filing of the present application the reasons had not been made available. Cognisant of the requirements in the Supreme Court Rules (Miscellaneous Appeals and References) 1975 to file an appeal within the stipulated period the Applicant had proceeded to file the present application for leave. The Applicant position was that it was within its rights as a litigant to file the application for leave as it intends to challenge the decision taken by this court. The point in *limine* clearly therefore had no merit and stood to be dismissed. Ms Madzongwe, for the 1<sup>st</sup>

Respondent, persisted with her submission that in the absence of an attached judgement there was no proper application before the court. She also noted that in the draft order attached to the application, the Applicant had indicated that it intended to appeal against a ‘whole’ judgement. The application being fatally defective, therefore, the prayer was for the application to be struck off the roll with costs. The court after considering submissions by the parties found that the point in *limine* lacked merit. It was indeed the position that the court had handed down an order on 28 December, 2022. The order in its operative part reads as follows;

- i. The first preliminary point taken by 1<sup>st</sup> Respondent is upheld;
- ii. The second preliminary point taken by the 1<sup>st</sup> Respondent is dismissed;
- iii. The Applicant having departed from the draft appeal grounds that were condoned more particularly with ground number 4 that grounds stands to be struck off;
- iv. The preliminary point taken by Appellant is upheld;
- v. The deponent to 1<sup>st</sup> Respondent Notice of Response having failed to produce a board resolution authorising her representation there is consequently no proper Notice of Response before the Court;
- vi. The appeal is consequently granted as unopposed...

As it is apparent from the order the order clearly shows that the court found in respect of the 1<sup>st</sup> Respondent in that matter (now Applicant) first point in *limine* that save for ground number 4, there was no departure from the condoned grounds of appeal. The court directed the striking off of the offensive ground of appeal number 4. In respect of the 1st Respondent (now Applicant) second point in *limine* it was dismissed for lack of merit. The court proceeded to uphold a point in *limine* as taken by Applicant in that matter (now 1st Respondent) which was a point related to the absence of authority to the deponent to the Opposing Affidavit. The finding was that in the absence of such authority in the form of company board resolution, there was consequently no valid opposition to the appeal. The appeal had to consequently be granted. This was the basis for the court granting the order.

The order was in my considered view in the form of default order. No valid opposition having been placed before the court, the appeal automatically had to succeed as the 1st Respondent (now Applicant) had essentially failed to comply with the rules by failing to attach a board resolution. I do concede that the reasons for the order were not made available to the Applicant in time in order to allow the Applicant to note its intended appeal to the Supreme Court. It is for this reason I dismissed the point in *limine* as taken by the 1<sup>st</sup> Respondent in the present proceeding as I believe it is within the Applicant’s right to file an application for leave to appeal notwithstanding the absence of the reasons.

#### MERITS

On the merits it is the position at law an intended appeal to the Supreme Court, against a decision of the Labour Court has to satisfy two requirements. **Section 92 F** of the **Labour Act [Cap 28:01]** refers. Firstly the intended appeal, has to raise a question of law. Secondly, the intended appeal has to have good prospects of success on appeal. The court was aptly referred by Applicant to several authorities. Having outlined the requirements that ought to be met in an application such as this one, having also considered the intended grounds of appeal to the

Supreme Court, the submissions made thereto by both parties, and the authorities as cited by them my view is that this application ought to succeed. It is clear that the intended appeal raises amongst others, a pertinent question of law which ought to be clarified by the Supreme Court. The legal question arises from the Appellant's intended ground of appeal number 3. The intended grounds of appeal are outlined as follows;

1. Having upheld the preliminary point that the Appellant has departed from the condoned grounds of appeal, the Labour Court erred in failing to strike off the roll the notice of appeal in its entirety;
2. The Labour Court further erred in failing to find that grounds number 1 and 4 of the Appeal were defective in that they were not precise and particular and consequently had to be struck off;
3. Further, the Labour Court erred in failing to legally appreciate and find that there was no need to attach a board resolution for a deponent who had been duly authorised to depose to an opposing affidavit and had always acted for the 1<sup>st</sup> Respondent without challenges;
4. A fortiori, having already ruled and upheld a preliminary point taken in the Notice of Response, the Labour Court grossly erred in later on ruling that there was no Notice of Response before the Court and that the matter was unopposed.

In light of the seemingly conflicting decisions from the Supreme Court as well as the High Court it would appear to me that this question of law ought to be addressed and clarified by the Supreme Court. The question is whether a deponent to an Affidavit, who purports to represent a legal entity, is required, in all cases, to prove that he/she is duly authorised to represent a legal entity. Does the failure to attach a board resolution result in a nullity? Is it still necessary to attach a board resolution to an Opposing Affidavit in circumstances where the same agent represented the Respondent Company in the hearings a quo? These are some of the issues that arise from the issue of law. The factual circumstances in this case clearly show that the Applicant failed to produce a board resolution before the court; this even after the issue had been raised as a challenge by the 1<sup>st</sup> Respondent in its heads of argument. The Applicant failed to produce the board resolution even over the bar. The Applicant instead maintained that a divergent position had been adopted by the Supreme Court and High Court on this issue.

In respect of the relevant authorities on the subject there is the *Cuthbert Elkana Dube v Premier Medical Aid Society & Another* SC 73/19 decision which judgement relied heavily on the *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514 (S) referred to by the 1<sup>st</sup> Respondent in his heads of argument. The court in *Madzivire* decision held, inter-alia, that a company, being a legal persona, cannot be represented by a person not authorised through a resolution. Honourable Mathonsi J however in *Tian Ze Tobacco (Private) Limited v Munhuyedwa* HH 626/15 appears to have departed from that approach. I would also throw in the mix what is the latest judgement on the issue, although the authority was not specifically pleaded before me by the parties in this case. It simply goes to show the fluidity of the law on this subject. This is the decision by Honourable Chitapi J in *TN Gold Acturus Mine v Pari & Ema* HH 612/21.

It is on this basis the court finds there is a reasonable prospect of success on appeal.

In the event the following order is made.

1. The application for leave be and is hereby granted.
2. Costs of the application for leave to appeal shall be in the cause.