Judgment No SC 10/08
Civil Appeal No 248/07

FIONA CHIKURUNHE AND TWO HUNDRED AND THIRTY-FOUR OTHERS v ZIMBABWE FINANCIAL HOLDINGS

SUPREME COURT ZIMBABWE
HARARE, MARCH 12 & MAY 20, 2008

T Biti, for the applicants

R Y Phillips, for the respondent

Before: GARWE JA: In Chambers in terms of s 92(F) of the Labour Act, [*Cap 8:01*].

This is an application for leave to appeal to the Supreme Court in terms of s 92 (F) (3) of the Labour Act, [Chapter 28:01].

This matter was heard before the Labour Court, Harare. The facts which the court found were common cause were that the two parties to this matter were at the relevant time engaged in discussions regarding the conditions of service of the applicants in general and a cost of living adjustment in particular. On 24 September 2004 the applicants withdrew their labour from 8.00 hours, to 10.00 hours i.e a period of two hours. The withdrawal of labour was countrywide and had the effect of disrupting the respondent's operations.

At issue before the Labour Court was whether on the basis of the above facts the applicants had engaged in a collective job action as defined in s 2 of the Labour Act, Cap 28:01. The court found that the applicants had withdrawn their labour in a concerted action aimed at causing the respondent to take some action. In the event the Labour Court dismissed the appeal before it with costs.

Not satisfied with the above decision, the applicants applied to the Court for leave to appeal to the Supreme Court. That application was turned down on 18 September 2007. On 7 November 2007 the applicants then filed the present application seeking leave to appeal against the decision of the Labour Court.

In their founding papers, the applicants submit that the decision of the Labour Court was on a point of law. They further submit that the court was wrong in coming to the conclusion that what happened constituted a collective job action.

The respondent opposed the application on three grounds. These were firstly that the deponent to the applicants' founding affidavit had no authority to represent the remaining applicants; secondly that the leave that the applicants seek is on a question of fact and not law; and thirdly that the court *a quo* was correct in coming to the conclusion that the conduct of the applicants on the day in question constituted an unlawful collective job action.

At the hearing of the matter before me Mr *Phillips* made no submissions on the suggestion that the deponent had no authority to file the present application on behalf of the other applicants. I therefore assumed that this submission was no longer being persisted in. He, however, made the point *in limine* that the application had been filed out of time and was therefore not properly before the Court. He also submitted that on the merits the application is hopeless and should be dismissed.

Section 92 F(3) of the Labour Act provides that if the President of the Labour Court refuses to grant leave, the party seeking such leave may seek leave to appeal from a Judge of the Supreme Court. No time limit has been provided for within which such an application may be made to a Supreme Court Judge. Mr *Phillips* suggested that pursuant to the provisions of r 58 of the Supreme Court Rules, Rules 262 and 263 of the High Court Rules apply in the instant case. That submission is not correct. Rules 262 and 263 relate specifically to criminal proceedings and in particular to a situation where after sentence the accused immediately makes an oral application for leave to appeal to the Supreme Court or where he fails to do so he files a written application within twelve days of such decision for such leave. Whilst accepting that Rule 58 of the Supreme Court Rules provides that in any matter not provided for in the Rules the practice and procedure of the Supreme Court shall as far as is possible follow the practice and procedure of the High Court, I am of the view that Rules 262 and 263 refer to a different situation altogether and that therefore they do not apply in the present situation.

As already observed, neither the Labour Court Rules nor the Supreme Court Rules have made provision for the time limit that is to apply in this situation. There is therefore a gap in the law in this regard. The point *in limine* raised by *Mr Phillips* in this regard must therefore fail.

The respondent has argued that this application should be dismissed

because the decision in respect of which leave to appeal is sought was on the facts and not law. I do not agree with this submission. The facts of this case were common cause and have already been outlined in this judgment. Whether those facts constitute a collective job action as defined in the Act would appear to me to be a question not of fact (as the facts are common cause) but rather of law.

On the merits however it seems to me that the applicants have no prospects of success on appeal. The facts which the court found were common cause warranted the conclusion that indeed a collective job action was carried out. The applicant's conduct must be viewed in the context of discussions that were taking place on the applicants' conditions of service and in particular the need for a cost of living adjustment. The suggestion by Mr *Biti* that it is not clear what demand was made is therefore not tenable. In my view, the conclusion reached by the learned President is unimpeachable.

One further matter calls for comment and that is the suggestion by Mr *Biti* that an application of this matter should be routinely granted by this Court since the restriction on the right of appeal imposed by s 92 is a derogation from a party's constitutional right to appeal. I do not agree with this submission. Complying with the provision of s 92 F(3) should not be regarded as mere formality. 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.

The applicants have no prospects of success on appeal.

The application is accordingly dismissed with costs.

Honey & Blackenberg, applicants' legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners