DISTRIBUTABLE (16)

RONI MASEKESA
v
KINGDOM FINANCIAL HOLDINGS

SUPREME COURT OF ZIMBABWE
HARARE, JULY 3, 2012

E Magogo, for the applicant

Advocate L Uriri, for the respondent

Before, ZIYAMBI JA: in Chambers, in terms of r 6 of the Supreme Court (Miscellaneous Appeals and References) Rules 1975.

This application should, strictly speaking, be one for an extension of time within which to note an appeal in terms of s 6 of the Supreme Court (Miscellaneous Appeals and References) Rules 1975 (hereinafter referred to as "the Rules") because in my view any purported appeal filed out of time is no appeal at all. Hence one cannot condone what does not exist. The background is as follows.

The applicant was employed by the respondent as an assistant accountant for 4 years. On February 2004 he was charged with various acts of misconduct including misusing, for an unauthorized purpose, assets belonging to his employer. He claims that he was charged in terms of a work place code of conduct notwithstanding the existence of a registered industrial code. He was found guilty as charged and a penalty of dismissal was imposed. He appealed to the Labour Court which upheld his appeal and, by Order dated 25

October 2005 ("the Order"), ordered his reinstatement without loss of salary or benefits with effect from the date of dismissal without an alternative order of damages. By then, he was in the employ of the Ministry of Agriculture.

In June 2010, the applicant applied to the Labour Court for quantification of the salary and benefits due to him in terms of the Order. The Labour Court having heard argument on the matter, and having taken into account the fact that the applicant had been in the employ of the Ministry of Agriculture, granted damages *in lieu* of reinstatement. It ordered that the respondent pay, to the applicant, damages in a sum equivalent to six months' salary at the rate applicable on 25 October 2005. The applicant was aggrieved by the order of the Labour Court and obtained leave from that Court to appeal to this Court on August 2011. The sequence of events is as follows:

- February 27 2004: dismissal from employment;
- 2004: Appeal to Labour Court filed;
- September 6, 2004: employed by Ministry of Agriculture as accountant;
- July 25 2005: hearing of appeal before Labour Court;
- October 25 2005: Labour Court upheld applicant's appeal and ordered reinstatement;
- March 31 2009: applicant dismissed by Ministry of Agriculture;
- June 2010: applicant applied to Labour Court for the quantification of salaries and benefits due to him in terms of the Order;
- February 25 2011: Labour Court granted damages *in lieu* of reinstatement equivalent to 6 months' salary at rates applicable on 25 October 2005, the date of the Order reinstating the applicant;
- August 2011: leave to appeal to the Supreme Court granted by the Labour Court;
- January 6 2012: this application filed.

A person wishing to exercise his right of appeal on a point of law from a judgment of the Labour Court is required by the Rules of that court to seek its leave to appeal within 30 days of the date of the judgment. The date on which the application for leave to appeal was made is not apparent on the record but, as will be seen from the above, the judgment of the Labour Court sought to be appealed against was given, *ex facie* the judgment, on 25 February 2011. The applicant would have had 30 days within which to make the application.

In terms of s 5 of the Rules, however, an appeal to the Supreme Court shall be noted within 15days of the date on which the judgment appealed against was given. Thus the applicant was confronted with the hurdle faced by all would- be appellants to the Supreme Court from judgments of the Labour Court. He had to seek and obtain leave of the Labour Court before he could file his notice of appeal to this court. In this case leave to appeal was granted by the Labour Court on 11 August 2011 by which time the 15 days had long elapsed.

In an application in terms of s 6 a judge may extend the time within which to note an appeal if special circumstances are shown. It is settled that special circumstances would include the cumulative effect of, *inter alia*, the extent of the delay in filing the notice of appeal, a reasonable explanation for the delay, reasonable prospects of success of on appeal and any prejudice to the party against whom the application is granted.

The instant application was filed on 16 January 2012 in excess of 5 months from the date of the grant of leave to appeal by the Labour Court. Such a delay is by all

accounts inordinate. The explanation given for the delay is that there was a change of legal practitioners. The applicant in his founding affidavit states as follows:

> "From the date of the judgment to date, there has been a change of legal practitioners and my legal practitioners in the instant proceedings only assumed agency on the 9th of January 2012 after it had taken more time to get a renunciation of agency from my erstwhile legal practitioners...".

No supporting affidavit from the "erstwhile" legal practitioners was attached in support of this vague averment nor was any further explanation given for the delay. In my judgment, no reasonable explanation for the delay has been given. In an application of this nature, the indulgence of the court is being sought and an applicant wishing to succeed in his application must set out fully facts which will enable the Judge to come to a conclusion that special circumstances exist which justify the grant of the indulgence sought. The founding affidavit is woefully lacking in this regard.

As to the prospects of success, it will be seen from the sequence of events set out above that the applicant obtained alternative employment with the Ministry of Agriculture within six months from the date of his dismissal by the respondent. He was employed at first as 'Accountant' and later promoted to the post of 'Senior Accountant'. The hearing of the appeal by the Labour court took place on the 25 July 2005. The applicant did not advise the court that he was then working with the Ministry of Agriculture. The court upheld his appeal and, by Order dated 25 October 2005 remitted the matter to the respondent for a fresh hearing and directed that pending the fresh disciplinary hearing the applicant be reinstated to his original position without loss of salary or benefits with effect from the date of dismissal.

The legal position which then pertained was that the applicant was no longer an employee of the respondent having obtained permanent employment elsewhere and the Order could not be carried out. That notwithstanding, the respondent noted an appeal against the Order. That appeal lapsed on the 18 November 2006.

On 31 March 2009 the applicant was dismissed by the Ministry of Agriculture for misconduct. It was not until some fifteen months later, in June 2010, that the applicant decided to pursue his rights in terms of the Order. According to the applicant, he launched an application in the Labour Court for quantification of the monies due to him in terms of the Order from the date of dismissal to the date of judgment, 25 February 2011. (The Labour Court's judgment however states that the application was for quantification of damages *in lieu* of reinstatement).

Whatever the wording of the application, the Labour Court was of the view that the application was for quantification of damages in lieu of reinstatement and treated it as such. It found as a fact that the applicant had been in the permanent employment of the Ministry of Agriculture from September 2004 despite the applicant's argument to the contrary that it was merely temporary employment, and ordered the respondent to pay the applicant damages – *in lieu* of reinstatement- equivalent to six months' salary at the rate applicable on 25 October 2005 the date on which the Order of reinstatement was made.

The grounds on which it is proposed to appeal are set out as follows:

"Grounds of Appeal

1. The Honourable President grossly erred at law in failing to find as she should have done that the respondents had approached the Court with dirty hands since they had

not purged their contempt, having wantonly disregarded an earlier order by Honourable President Mtshiya.

2. The honourable President grossly misdirected herself on a point of law in treating the application for quantification of outstanding salaries and benefits as one for quantification of damages *in lieu* of reinstatement when it was clear that damages *in lieu* for reinstatement were not part of Honourable President Mtshiya's earlier order.

3. The learned President *a quo* grossly erred and seriously misdirected himself on the facts which amounted to misdirection on the law in failing to find, as she should have done, that appellant was temporarily employed.

4. Honourable President further misdirected herself on a point of law in finding that, by so securing alternative employment, appellant had repudiated the contract and therefore it was only entitled to damages for the period before the re-employment.

5. The learned President further misdirected herself on a point of law in ordering the payment of the said damages in the now moribund Zimbabwean dollar currency when it was common cause that making such an award is no worse than awarding nothing to the applicant."

None of the proposed grounds of appeal is sustainable. As to the first ground of appeal, the applicant had already obtained permanent employment with another employer. The Court concluded that he had repudiated his contract of employment with the respondent so that at the date of the order he could not tender his services to the respondent. The court *a quo* was correct. Its finding is supported by cases such as *Zimbabwe Sun Hotels (Pvt) Ltd vs Lawn* 1988 (1)ZLR 43 (S), *Ambali v Bata Shoe Company* 1999 (1) ZLR 417, *Nyaguse v Makwasine Estates (Pvt) Ltd* 2000 (1) ZLR 571 (S). Not only did the applicant's repudiation place the respondent in a position where it could not perform the order of the court, and therefore did not have 'dirty hands' but, as the respondent pointed out, the approach to the Court was made by the applicant. He it is who caused the respondent to be summoned before the court. In any event the court has a discretion as to whether or not to hear a party allegedly in contempt.

Grounds two and four can be determined on the same basis. Since the court cannot be faulted in its finding that by obtaining permanent employment the applicant had repudiated his employment contract, the prospects of the Supreme Court holding that the Labour Court erred in concluding that only damages *in lieu* of reinstatement were due to the applicant are remote.[1]

Ground three alleges a gross misdirection on the facts which amounts to a misdirection in law.[2] In view of the evidence led in the court *a quo*, it cannot be said that the finding by the Labour Court was so irrational that no tribunal applying its mind to the matter would have arrived at the conclusion reached by the court *a quo*. Indeed the court *a quo* gave clear and sound reasons for its conclusion having heard evidence from the Ministry of Agriculture that the applicant was permanently employed there and had been promoted to the post of senior accountant.

On the fifth ground, the damages granted were in Zimbabwe dollars, the currency in which the applicant was paid by the respondent and which was in use as at the date of the order for reinstatement. There appears on the record to be no legal basis, and the applicant could not point to any, on which a court could order payment to be made in United States dollars.

The PRAYER to the Notice of Appeal deserves mention. It is in three parts. The first is for an order that the applicant be reinstated by the respondent into "his 'job' without loss of salary or benefits with effect from 26 February 2009 being the date of unfair

[1] Leopard Rock Hotel Company (PVT) v Van Beek 2000 (1)ZLR 251 (S) at 255
[2] National Foods Limited v Magadza SC105/95

dismissal". The point to be made here is that the dismissal took place in February 2004 and that no basis has been laid in the proposed notice and grounds of appeal which would justify a grant of this order by an appeal court.

The second part of the prayer is that the respondent be ordered to comply with the "order by Honourable President Mtshiya dated 25 October 2005 in its entirety". This prayer cannot be granted as it calls for a disciplinary hearing to be held by the respondent to enquire into acts of misconduct by the applicant, who is no longer an employee of the respondent, as well as reinstatement of the applicant pending a disciplinary hearing.

In the third part of the prayer an order is sought remitting the matter back to the Labour Court for quantification of outstanding salaries and benefits up to the date of reinstatement. The grounds of appeal do not support that prayer. In any event the applicant started work with the Ministry of Agriculture before the date of the order for his reinstatement.

I have set out the grounds of appeal and the Prayer in some detail to demonstrate that the applicant has not established that there are any prospects of success on appeal.

In the result, the applicant has established no special circumstances which would induce me to grant the indulgence of an extension of time within which to appeal.

The application is accordingly dismissed with costs.

Matsikidze & Mucheche, applicant's legal practitioners

Uriri Attorneys at Law, respondent's legal practitioners