SHECKEM BARRISTER NGAZIMBI
v
MUROWA DIAMONDS (PVT) LTD

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & OMERJEE AJA
HARARE, FERUARY 14, 2012 & JUNE 24, 2013

H Zhou, for the appellant
T Mpofu, for the respondent

MALABA DCJ: This is an appeal against the judgment of the Labour Court upholding the decision of the appeals officer to dismiss the appellant from employment with the respondent. At the beginning of the hearing, Mr *Mpofu* who appears for the respondent raised two points *in limine*. Firstly, he argued that the notice of appeal against the judgment delivered on 21 February 2011 does not comply with the provisions of s 92F of the Labour Act [*Cap. 28:11*] ("the Act") and is therefore a nullity. The notice of appeal was filed by the appellant on 9 March 2011. Leave to appeal to the Supreme Court was granted by the Labour Court on 2 June 2011. The second point taken was that the grounds of appeal do not raise questions of law as required by s 92F of the Act. The preliminary points were contested by Mr *Zhou* on behalf of the appellant.

Section 92F of the Labour Act [*Cap. 28:01*] provides that:

> "1. An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court.
> 2. Any party wishing to appeal from any decision of the Labour Court on a question of law in terms of subsection (1) shall seek from the President who made the decision leave to appeal that decision.

3. If the President refused leave to appeal in terms of subsection (2), the party may seek leave from the judge of the Supreme Court to Appeal."

On 21 February 2011 the Labour Court gave a judgment against which the appellant sought to institute an appeal on 9 Marcy 2011. Rule 5 of the Supreme Court (Miscellaneous Appeals and References) Rules 1975 ("the Rules) provides that an appeal against a decision of the Labour Court shall be instituted within fifteen days of the decision being given. The notice of appeal must be delivered to all interested parties and filed with the registrar of the Supreme Court within fifteen days of the decision appealed against being given.

The Notice of Appeal delivered and filed by the appellant was filed before leave to appeal was granted. Leave to appeal was granted by the Labour Court on 2 June 2011. The respondent's heads of argument drew the attention of the appellant's legal practitioner to the fact that the purported notice of appeal did not comply with s 92F (2) of the Act and therefore a nullity.

Mr *Zhou* argued that r 5 is not made subject to the provisions of any other enactment. Accordingly it is not subject to the provisions of the Labour Act. Rule 5 of the Rules provides:

> "Subject to the provisions of r 6 a notice shall be delivered and filed in accordance with the provisions of r 4 within fifteen days of the decision appealed against being given."

Mr *Zhou* further argued that in terms of the Labour Court Rules Statutory Instrument 59 of 2006 the application for leave to appeal to the Supreme Court may be made within thirty days after the date on which the judgment appealed against was given. An

application for leave to appeal can validly be made after the *dies induciae* of 15 days has expired. Mr *Zhou* said an absurdity is created which results in all appeals from the Labour Court of necessity being out of time. The interpretation by Mr *Zhou* of r 36 of the Labour Court Rules and s 92F (2) as read with r 4 and 5 of the Rules would mean that all the provisions must be complied with before an application for leave to appeal is granted. The fact that in terms of r 36 of the Labour Court Rules, leave to appeal may be granted after the expiry of the time within which to note an appeal against the judgment as required by r 5 of the Rules does not mean that a notice of appeal which precedes the granting of leave to appeal has been validly delivered and filed.

The purpose of requiring leave before noting an appeal to be given by the President of the Labour Court or upon refusal, by the judge of the Supreme Court in terms of s 92F(2) of the Act is to prevent appeals not based on questions of law getting to the Supreme Court. The right to appeal given by s 92F (1) is a limited right. The exercise of it is made conditional upon leave being granted.

A wish to exercise the right to appeal remains in the mind of the person intending to appeal. As long as it is not communicated to the President of the Labour Court who made the decision or a judge of the Supreme Court upon refusal of leave by the latter it cannot be granted or refused. When communicated by way of application for leave to appeal, the party is seeking the right to lodge the appeal. The law interposes the President of the Labour Court between the wish to appeal and the action to lodge the appeal. The authority when granted is prospective rather than retrospective. In other words it could not be known whether an appeal is open to him until the special leave is given by the President of the Labour Court or upon refusal by him or her, by a judge of the Supreme Court.

Mr *Zhou* submitted that in the case of *Holt v Brook* 1959(3) SA 803, the Court held that where leave to appeal is necessary the notice required by para(a) of s 61 of Act 39 of 1896(N) could properly be filed and served before leave to appeal was granted. That position, with respect, would be inconsistent with our law. The court does not accept it as applicable in the present case. According to our law, authority must be sought from the President of the Labour court for leave to exercise the right to appeal. Until that authority is granted, there cannot be said to be an appeal pending before the Supreme Court even though a purported notice of appeal has been filed. It is important to relate the requirement for an application for leave to appeal to the purposes thereof. These are for the decision to be made on the questions whether the grounds of appeal relate to questions of law and the existence of prospects of success on appeal. A notice of appeal required by r 5 of the Rules contains matters expressive of more than an intention to appeal. A validly filed and delivered notice of appeal has the effect of entrenching the appeal.

In *Jensen v Acavalos* 1993(1) ZLR 216(S), the appropriate remedy for having a proper notice of appeal placed before the Court was stated. The procedure involves an application for an extension of time within which to note an appeal and condonation for late noting of appeal made to a judge of the Supreme Court. See *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004(2) ZLR 147(S). As no valid notice of appeal was filed and delivered after the grant of leave to appeal by the Labour Court on 2 June 2011, there is therefore no appeal before the Supreme Court.

In *Church of the Province of Central Africa v Kunonga & Anor* 2008(1) ZLR 413 (S) at 418, the Court dealt with the effect of a notice of appeal not complying with the statutory requirements as follows:

> "In my view, a distinction has to be made between those matters where the notice of appeal is invalid by reason of failure to comply with the provisions of the statutes, such as section 43 of the High Court Act, and a situation where a notice of appeal is invalid by reason of failure to comply with the rules of the Supreme Court. Where a notice of appeal does not comply with the provisions of the Act of Parliament, the court has no discretion in the matter and the defect is incurable. In a situation like that, it is open to the Court, and indeed a judge of the Supreme Court, to order that the appeal is a nullity and is incurably defective."

Without an application for an extension of time within which to institute the appeal and for condonation of non-compliance with r 5 no appeal has been noted. The matter must be struck off the roll. It was not difficult for the appellant to regularise the situation by invoking the remedy provided for the benefit of litigants in his position.

Having come to the conclusion that there is no appeal before the Court, it became unnecessary to decide whether the grounds of appeal in the notice of appeal filed before leave to appeal was granted raise questions of law as required by s 92F of the Act.

In the circumstances, the following order is made:

1. The point *in limine* be and is hereby upheld.
2. The matter is struck off the roll with costs.

ZIYAMBI JA: I agree

OMERJEE AJA: I agree

Mhiribidi, Ngarava & Moyo, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners