REPORTABLE (7)

(1) CHRIS STYLIANOU (2) FRED DRIVER AND SONS (PRIVATE) LIMITED (3) D.R. HENDRY (PRIVATE) LIMITED
v
MOSES MUBITA AND 25 OTHERS

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GUVAVA JA & BHUNU JA
BULAWAYO, MARCH 29, 2016

T. Magwaliba, for the appellants

T. Mudenda, for the respondents

GWAUNZA JA: This is an appeal against the entire judgment of the Labour Court sitting at Bulawayo, handed down on 18 January 2010. After reading documents filed of record and hearing counsel, we made the following order:

"**IT IS ORDERED:**

1. The appeal be and is hereby allowed.
2. There shall be no order as to costs.
3. The judgment of the Labour Court in cases No. LC/URG/MT/25/08 and LC/MT/37/08 be and is hereby set aside and substituted with the following:
   "(i) The urgent chamber application by the respondents be and is hereby struck off the roll.
   (ii) The urgent chamber application by the applicants be and is hereby struck off the roll.
   (iii) The retrenchment agreement entered into between the parties and approved by the Retrenchment Board be and is hereby upheld.
   (iv) There shall be no order as to costs."

This judgment contains the reasons for the order.

Before I consider the merits of the appeal, it is pertinent to address two procedural issues arising from the papers before the court.

Firstly, it was noted that the notice of appeal was filed eighteen days after leave to appeal was granted by this court, instead of the fifteen days required by r 5(1) of the Supreme Court (Miscellaneous Appeals and References) Rules, 1975. However, upon inquiry, counsel for the appellant, Advocate *Magwaliba* submitted that no hearing for the application for leave to appeal was held since the application was granted on the basis of the papers before the judge in question. The parties only got to hear of the order on a later date.

It is in my view important to point out in this respect that when an order is made in chambers following a determination of the matter on the papers before the judge and in the absence of the parties, the registrar should promptly notify the parties of the order. This is particularly so, since the *dies induciae* for any subsequent filing of papers in the matter would start to run from the date of the order, not the date on which the order was served or came to the notice of the parties concerned. *In casu* it was the court's view that since the appellants could not be faulted for the delay in noting the appeal, such late noting could properly be condoned.

Secondly, while the notice of appeal was brought under the citation "*Chris Stylianou and Fred Driver and Sons (Pvt) Ltd and D.R. Henry (Pvt) Ltd v Moses Mubita & 50 Others* SC 117/11", it was not disputed that only 26 respondents were properly before the court. The parties duly filed an agreed and signed list of 26 named respondents, dated 30 March 2016. The court used its discretion and accepted the revised list of respondents.

This judgment therefore applies only to these 26 respondents[1].

The factual background to the matter is as follows;

The first appellant was at the time of the institution of these proceedings in the court *a quo*, said to be the 'owner' of the second and third appellants. In legal terms he was the director and sole shareholder thereof. The second and third appellants were companies duly registered in terms of the laws of Zimbabwe. The respondents were employed by the second and third appellants and due to viability constraints, a decision was taken to retrench them. A notice to retrench dated 15 April 2008 was duly issued, and bore the names of those affected by the decision to retrench. Efforts were made to negotiate a retrenchment package but no agreement was reached, prompting the parties to seek the assistance of the relevant National Employment Council ("NEC"). The NEC gave the parties up to 15 May 2008 to reach a compromise, failure of which the matter would be referred to the Retrenchment Board. The parties reached an agreement before this deadline. As required by s 12C(3) of the Labour Act **[***Chapter 28:10*] ("the Act"), approval for the retrenchment of employees was signed by the parties and sent to the Retrenchment Board which in turn gave its approval in terms of the same section of the Act.

When the appellants were about to implement the approved settlement, the respondents changed their minds and approached the Labour Court with a chamber application for an interdict whose effect would be to stop the appellants from implementing the retrenchment package that was approved by the Retrenchment Board. The respondents also cited irregularities in how the retrenchment agreement came about, in particular, that it was not agreed upon because some members of the Worker's Committee had not signed it.

[1] See Addendum to this judgment.

They further alleged that the approved settlement was not ratified by the affected employees and neither was it approved by the Minister.

In the same urgent chamber application, the respondents were seeking a final order that the agreement for the retrenchment package be declared null and void and the Retrenchment Board's approval thereto, set aside. The final order would allow reinstatement of the respondents without loss of wages or benefits. A provisional order was granted on 23 May 2008. It interdicted the first appellant from paying out retrenchment packages to the respondents without an order of court.

The main matter on the final order sought was set down for hearing on 4 July 2008 but was not heard on that day. The parties negotiated further and signed another settlement document. When the appellants sought to implement the new agreement, the respondents refused to accept the package.

The matter was then heard on 18 January 2010 and the learned judge essentially held that the retrenchment itself was not done procedurally and was therefore a nullity. In the judge's view, this was a consequence of the fact that the Minister did not approve the retrenchment despite the agreement of the parties thereto. Aggrieved by the decision of the Labour Court, the appellants unsuccessfully sought the leave of that court to note an appeal to this court. They thereafter, and successfully, approached this court for leave to appeal to it, hence the instant appeal.

The appeal was brought on nine grounds. However, a number of the grounds were struck out for not being concise as required by the rules of this court, for containing argument or for making no sense at all.

It hardly needs re-emphasizing that grounds of appeal must conform to laid down requirements.

The issues that arose from the valid grounds of appeal were as follows:

i. Whether or not the court *a quo* erred in making an order against the first appellant.

ii. Whether or not the Labour Court has the jurisdiction to grant an interdict and a declaratory order.

I will proceed to deal with the issues as outlined.

Whether or not the court *a quo* erred in making an order against the first appellant.

The first issue raises the important principle, under company law, pertaining to the lifting of the corporate veil.

The first appellant was cited in the court *a quo* as the first respondent, in his perceived capacity as the 'owner' or *alter ego* of the second and third appellants herein. The first appellant challenged this citation as improper, arguing that he could not be cited in legal proceedings against and together with the two companies, since they were at law separate legal *personae* capable of suing and being sued in their own names. The respondent's counsel

conceded, at the hearing of the appeal, that the first appellant had not been properly cited, even as a respondent in the court *a quo*. This concession, we find, was properly made.

The principle of lifting the corporate veil was aptly enunciated by Patel J (as he then was) in the case of *Deputy Sherriff Harare v Trinpac Investments, (Pvt) Ltd & Another* HH 121-11, where among other authorities, he cited the following apposite remarks from the South African case of *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd & Others* 1995 (4) SA 790 (AD) at 803-804,

> "It is undoubtedly a salutary principle that our Courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct (and I confine myself to such situations) is found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil. … and a court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would obviously have to be considered on its own merits."

In casu, no allegation of fraud, dishonesty or other improper conduct was levelled against the first appellant, which might have justified the lifting of the corporate veil of the other two appellants. Indeed, the applicants gave no good explanation before the court a *quo* to justify the citation of the first appellant save to state that he was the 'owner' of the two appellant companies.

The first appellant was therefore improperly cited and no part of the court *a quo's* judgment was binding on him. The appeal therefore succeeds in this respect.

Whether or not the Labour Court has the jurisdiction to grant an interdict or a declaratory order.

The respondents approached the court *a quo* on an urgent chamber application basis provisionally seeking an interdict. On the return date of the provisional order, they sought a declaratory order to the effect that an agreement by the works council was null and void. I will deal with the interdict first and then consider the declaratory order.

Paragraph 1 of the provisional order under "interim relief" which was granted by the judge *a quo* on 23 May 2008 read as follows:

> "1. The 1st respondent be and is hereby interdicted from paying out retrenchment packages in respect of all 51 applicants (now respondents) without an order of the court."

The question that this order raises is whether or not the Labour Court has the jurisdiction to grant an interdict. Whenever the powers of the Labour Court come into question, it must always be borne in mind that it is a creature of statute (*Dombodzvuku v CMED (Pvt) Ltd* SC 31/12; *Nyahora v CFI Holdings (Pvt) Ltd* SC 81/14) and therefore can only exercise those powers that are given to it by the Labour Act, its enabling statute.

Section 89 of the Labour Act determines the functions, powers and jurisdiction of the Labour Court. The relevant section is s 89(1)(a) which reads as follows:

> "**89 Functions, powers and jurisdiction of Labour Court**
> (1) The Labour Court shall exercise the following functions—
> (a) hearing and determining applications and appeals in terms of this Act or any other enactment; …"

This court in *National Railways of Zimbabwe v Zimbabwe Railway Artisans Union & Others* SC 8/05 was faced with the same question, that is whether or not the Labour

Court has the jurisdiction to entertain an application for an interdict. Ziyambi JA held as follows:

> "… before an application can be entertained by the Labour Court, it must be satisfied that such an application is an application "in terms of this Act or any other enactment". This necessarily means that the Act or other enactment must specifically provide for applications to the Labour Court, of the type that the applicant seeks to bring. … nowhere in the Act is the power granted to the Labour Court to grant an order of the nature sought by the respondents in the court *a quo*, nor have I been referred to any enactment authorising the Labour Court to grant such an order."

It is thus clear on the basis of this authority, that the Labour Court has no power or jurisdiction to grant an interdict. When a court issues an order which it is not empowered to grant, that order is a nullity. It follows that the interdict granted by the court *a quo* was void *ab initio.*

Turning to the declaratory order granted by the court *a quo*, the same question arises as to whether or not the Labour Court has the jurisdiction to make such orders. Paragraph 4 of the provisional order attached to the urgent chamber application *a quo* read as follows:

> "4. The agreement signed by the works council ***will be and is hereby declared null and void."*** **(my emphasis)**

The same question was deliberated upon by Ziyambi JA in *UZ-UCSF Collaborative Research Programme in Women's Health v David Shamuyarira* SC 10/10 where she held as follows:

> "… nowhere in the Act is the power granted to the Labour Court to grant an order of the nature (declaratory order) sought by the respondents in the court *a quo*, nor have I been referred to any enactment. So, too, in this case, there is no provision in the Act (nor have I been referred to any provision in any other enactment) authorizing the Labour Court to issue the declaratory order sought by the respondent. It is therefore my view that the Labour Court ought to have dismissed the application for want of jurisdiction authorizing the Labour Court to grant such an order."

It is therefore evident that the court *a quo* acted outside its jurisdiction. Consequently, the declaratory order, like the interdict it granted, was null and void. The declaratory order was in any case, premised on the interdict that the court had already found was invalidly made. It therefore had no legal leg to stand on. For these reasons, we made the order setting aside both the interdict and the declaratory order.

It was in view of the foregoing that the court made the order set out at the beginning of this judgment.

GUVAVA JA: I agree

BHUNU JA: I agree

Coghlan & Welsh, appellants' legal practitioners

Mudenda Attorneys, respondents' legal practitioners

ADDENDUM

(1) CHRIS STYLIANOU (2) FRED DRIVER AND SONS (PRIVATE) LIMITED (3) D.R. HENDRY (PRIVATE) LIMITED
v
MOSES MUBITA AND 25 OTHERS

LIST OF RESPONDENTS

1. MOSES MUBITA
2. JOHN NYONI
3. JABULANI NDLOVU
4. YABULANI DOMINIC
5. EZEKIEL BANDA
6. BENJAMIN SHUMBA
7. LAZARUS SIBANDA
8. ELISHA GOZHO
9. NDABENJANI NDLOVU
10. CRISPEN MUPANGERI
11. CHARLES MOYO
12. JACK CHIMBUWA
13. ADAM NDLOVU
14. ALICK ZULU
15. ALICK NDOVU
16. ZAMANI NCUBE
17. JONA NCUBE
18. SEBASTIN NYANZIRA
19. HEPSON MAKETO
20. MUKOLA DUBE
21. BOKANI SIBANDA
22. MILLION MUKUCHWA
23. NATHANIEL MPOFU
24. JATE NYONI
25. NGEZVE NCUBE
26. ROBERT NYARENDA