

DISTRIBUTABLE (10)

ZIMBABWE ANTI CORRUPTION COMMISSION
v
(1) GIBSON MANGWIRO (2) CHRISTOPHER CHISANGO

SUPREME COURT OF ZIMBABWE
KUDYA AJA
HARARE 18 MAY 2021 AND 1 FEBRUARY 2022

M. Ndlovu and K. Magorimbo, for the applicant

T.L. Mapuranga, for the respondents

IN CHAMBERS

Judgment No. SC 11/2022
Civil Appeal No. SC 50/21

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KUDYA AJA: This composite application for condonation and extension of time for leave to appeal and leave to appeal raises an interesting question. It is whether an applicant who seeks and is denied condonation for the late filing of an application for leave to appeal in a lower court and therefore fails to make the actual application for such leave in that court, can procedurally seek leave to appeal from a judge of this Court in chambers.

The applicant filed the present application on 25 March 2021. It seeks condonation and extension of time for leave to appeal and leave to appeal against the original judgment handed down by the Labour Court on 24 February 2017. The application is opposed by both respondents.

The facts

The applicant is a constitutional body established in terms of s 254 of the Constitution of Zimbabwe, 2013. It is charged with the responsibility of combating corruption in all its manifestations in Zimbabwe. The two respondents are former employees of the applicant. The first respondent was a General Manager Finance, Administration and Human Resources and the second respondent was a Chief Accountant.

The two were charged with misconduct, found guilty and discharged from employment on 14 July 2016. They filed an application for review against the composition and findings of the Disciplinary Committee. The review application was based on 10 grounds. They sought, firstly, the nullification of their suspension, verdict and sentence and secondly their reinstatement to their previous positions on full benefits. The applicant refuted each and every ground of review.

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Findings of the Court a quo

On 24 February 2017, the court a quo dismissed the first three grounds of review that impugned the procedural propriety of amending the statute under which they were charged from the Anti-Corruption Act [*Chapter 9:22*] to the Labour (National Employment Code of Conduct) Regulations, 2006 SI 15/2006 model law. It found on the authority of *Standard Chartered Bank v Matsika* 1996 (1) ZLR 12 (S) that the amendment of the statute under which they were charged from the Anti-Corruption Act to the National Employment Code Model was proper. The amendment did not alter the charges of domiciling Treasury funds in their own company instead of in the account of the applicant nor was it prejudicial to the two as they were afforded adequate time of at least a month within which to respond to the charges and prepare their defences.

The Labour Court, however, upheld grounds 4 and 5, which it found to be dispositive of the review application without considering the remaining grounds of review. It found that the Disciplinary Committee was improperly constituted and held on the authority of *Madoda v Tanganda Tea Co* 1999 (1) ZLR 374, that it was voidable at the instance of the prejudiced respondents. It set aside the proceedings and remitted the matter to a properly constituted Disciplinary Committee.

The remittal was based on the sentiments of MUCHECHETERE JA in *Standard Chartered Bank of Zimbabwe Ltd v Chikomwe & Ors* SC 77/2000 that:

“...reinstating the respondent in the circumstances implies a finding that respondents were innocent of the charges of misconduct against them by the hearing officers...A setting aside of the proceedings of the disciplinary committees should therefore lead the parties to the same position before the hearing in the disciplinary committees-appeals before a properly constituted disciplinary committee.”

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The two respondents therefore remained on suspension but on full salary and benefits.

In terms of r 36 of the Labour Court Rules SI 59/06 the applicant had 30 days from the date of the judgment within which to apply for leave to appeal to the Supreme Court against the judgment of 24 February 2017. It failed to do so.

On 5 October 2017, it applied for the upliftment of the bar and condonation for late filing of an application for leave to appeal. It did not co-join this application with an application for leave to appeal.

On 23 February 2018, the Labour Court dismissed the application for upliftment and condonation. The requirements for such an application were the extent of the delay, the

reasonableness of the delay and prospects of success and the absence of prejudice to the other parties. The Labour Court found the delay inordinate and the explanation for the delay unreasonable. It was unable to assess whether or not there were prospects of success in the absence of a draft notice of appeal. It reasoned that without the draft notice of appeal, it was unable to ascertain whether the grounds of appeal were based on points of law as mandated by s 92F (1) of the Labour Act [*Chapter 28:01*]. This was despite the fact that the applicant had raised substantive points of law impugning the review judgment. The Labour Court clearly abdicated its responsibility to determine whether on the averments and arguments submitted in the application for condonation there were prospects of success. However, having found the application to be defective for lack of a draft notice of appeal, the proper course of action that the Labour Court should have taken was to strike off the application from the roll and not to dismiss it.

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Faced with this legal *conundrum*, on 16 March 2018, the applicant sought leave to appeal against the upliftment and condonation judgment, before the Labour Court. The application was heard on 25 June 2018 and dismissed on 17 August 2018. The basis for the dismissal was that the applicant failed to demonstrate that the intended appeal raised a question of law and that there were prospects of success on appeal.

On 28 August 2018, the applicant timeously sought leave to appeal against the upliftment and condonation judgment. It did not seek leave to appeal against the review judgment. On 19 October 2019, the application was struck off the roll by HLATSHWAYO JA, as he then was, for lack of the record of proceedings pertaining to the upliftment and condonation proceedings.

That record was availed by the Labour Court on 7 March 2019. The applicant then filed an application for condonation for the late filing of leave to appeal in SC 203/2019. The matter was set down before MAVANGIRA JA on 25 August 2019. She wrote a detailed 8 paged judgment SC 91/19 in which the application was struck off the roll with costs for the reason that it was lodged under the wrong rule.

In the body of the judgment MAVANGIRA JA lamented the fact that the applicant was assailing the upliftment and condonation judgment instead of the review judgment. She found it absurd that she was being requested to grant leave to appeal the upliftment and condonation judgment, which once granted would then enjoin the Supreme Court to determine whether or not to direct the Labour Court to grant condonation and hear the actual application for leave. She intimated that the applicant was enjoined by s 92F (3) of the Labour Act to seek leave from a judge of the Supreme Court in chambers once the Labour Court declined to grant it condonation for the late filing of an application for leave to appeal.

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On 5 December 2019, the applicant sought condonation and extension of time to appeal under r 43 (3) in SC 685/19. The application was struck off the roll by HLATSHWAYO JA, on 24 January 2020, on the ground that it should have been brought as a composite application.

On 29 May 2020, under SC 201/20, the applicant filed yet another application. On 16 July 2020, GUVAVA JA removed it from the roll with costs and ordered that the matter could only be reinstated upon the payment of the respondents' taxed costs in SC 685/19.

The taxed costs were duly paid. The re-enrolled application was heard by MAKONI JA on 23 September 2020. Apparently the draft notice of appeal did not identify the judgment sought to be appealed. The applicant, therefore withdrew the application and tendered the respondents' costs on the scale of legal practitioner and client.

The preceding five applications were lodged against the upliftment of the bar and condonation judgment. The present application is the first one that seeks condonation and extension of time to file an application for leave to appeal and the application for leave to appeal against the review judgment.

It will be recalled that the review judgment was handed down by the Labour Court on 24 February 2017. It is common cause that the applicant never did seek leave to appeal from the Labour Court after its stand-alone application for condonation and extension of time to file leave to appeal was dismissed.

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Mr *Mapuranga*, for the respondents, took two points *in limine* on that very point. The first was that the applicant could only make a chamber application for leave to appeal to a judge of this Court after such leave had been denied by the Labour Court. He therefore submitted that the application was improperly before me. The second was that the sole ground of appeal sought to be raised was so vague as to not specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet. He argued that the ground of appeal being fatally defective rendered the application a nullity.

Per contra, Mr *Ndlovu*, for the applicant contended that the ground of appeal was clear and concise, and not vague. Regarding the second preliminary point, he contended that the application was properly before me. He premised his argument on the lamentation of MAVANGIRA JA in SC 91/94.

I turn to consider the diametrically opposed arguments.

The applicant was taken on a wild goose chase by its erstwhile legal practitioners between the time they took over the matter from the Civil Division of the Attorney General’s Office in September 2017 to date. They correctly sought condonation for the late filing of the application for leave to appeal. It is not clear to me why they did not co-join that application with the actual application for leave to appeal. When that application was dismissed, the applicant’s legal practitioners did not know what to do. Their response was to file six consecutive but defective applications to this Court. By their own admission, they are not well acquainted with the Supreme Court Rules, 2018. Even after MAVANGIRA JA suggested that they should pursue leave in the main review matter, they still brought two ill-fated applications against the upliftment and condonation judgment before deciding to take up the learned judge of appeal’s “advice”.

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The first preliminary point raises an important question on the course of action an applicant ought to take when an application for condonation for leave to appeal is refused. In my view, the answer is provided as rightly observed by MAVANGIRA JA in s 93F (3) of the Labour Court Act. The section reads:

“92F Appeals against decisions of Labour Court

- (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 or, in his or her absence, from any other President leave to appeal that decision.
[Subsection amended by section 18 of Act 5 of 2001. Amendment erroneously referred to section 94F instead of to 92F.]
- (3) If the President refuses leave to appeal in terms of subsection (2), the party may seek leave from the judge of the Supreme Court to appeal.
[Section inserted by section 32 of Act 7 of 2005]”

In terms of s 92 F (1), an appeal from the Labour Court lies to the Supreme Court on a point of law. Section 92 F (2) requires the appellant to seek leave to appeal from the Labour Court. And s 92 F (3) prescribes that the prospective appellant who is denied such leave approaches a judge of the Supreme Court. The application before a judge of this Court is not an appeal against the refusal of the Labour Court. It is a legislative device that provides access to the Supreme Court to an aggrieved litigant. It allows a higher judicial officer to reconsider the grievance with an unjaudiced eye.

The effect of a dismissal of an application for condonation for leave to appeal is to deny the applicant access to the Supreme Court. The court *a quo* dismissed the only application that would have opened the applicant's way to this Court. In the circumstances, it became legally impossible for the applicant to seek leave from the court a quo. The import of the dismissal was to refuse the applicant leave to appeal to this Court. The refusal by operation of law, therefore, activated s 93 (F) of the Labour Act. In terms of r 60 (2) of the Supreme Court Rules, 2018, the applicant had, as at the date of the refusal (23 February 2018), 15 days within which to seek leave to appeal from a judge of this Court. Instead, for a period of three years, it went on a wild goose chase, in which it mounted five useless applications, which clearly wasted valuable judicial time.

I, respectfully, agree with the suggestion by MAVANGIRA JA in the former case involving the applicant and the respondents, *supra*, that the proper course of action was for the applicant to seek leave to appeal before a judge of this Court once the condonation application was refused. It would be absurd to require the applicant to seek leave to appeal against the dismissal and require the Supreme Court to determine whether condonation was properly refused or not. Such a circuitous route to appeal the substantive judgment could not

have been in the contemplation of the Legislature, which amongst other things, requires that Labour matters be completed inexpensively and timeously with minimum regard to formalism.

In the circumstances, I agree with Mr *Ndlovu*, that the composite application for condonation and leave to appeal against the substantive review judgment is properly before me. The first preliminary point, therefore, ought to be dismissed.

The second preliminary point attacks the propriety of the sole ground of appeal, which reads as follows:

“The court *a quo* erred and misdirected itself in finding that the disciplinary committee was improperly constituted”

The relief sought is the success of the appeal with costs, the setting aside of the judgment *a quo* and its substitution with the dismissal of the application for review.

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I agree with Mr *Mapuranga* that the ground of appeal does not particularize the basis for the complaint. It is unclear whether the ground attacks a factual finding or a legal finding.

In my view, the ground of appeal is incomplete and therefore vague. It falls squarely into the category of defective grounds of appeal that are bad at law, which in the words of LEACH J in *Sonyongo v Minister of Law and Order* 1996 (4) SA 384 at 385F:

“specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet.”

Indeed, as pertinently observed by MAKONI JA in *Mahommed v Kashiri* SC 85/19 at p 9 of the cyclostyled judgment:

“The applicant’s first ground of appeal simply complains that the court below was wrong in making a particular finding and should have instead made a different finding. The basis of the attack is not stated...Further, the ground of appeal does not indicate why the finding of fact or ruling is to be criticized as wrong, is said to be wrong.”

And as it was so eloquently pitched by GARWE JA in *Zimbabwe Open University v Ndekwere* SC 52/19 at para [41]

“The gross aberration on the facts was not articulated. It remained a bald allegation impugning findings of fact. It did not state how and in what way the arbitrator grossly erred in reaching the conclusion that was sought to be impugned. In these circumstances, it remained an attack against a simple finding of fact and, clearly, does not raise any issue of law”.

All the above sentiments apply to the sole ground of appeal to be raised by the applicant on appeal.

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The defective ground of appeal renders the application, before me, a nullity. It is trite that a nullity cannot be condoned or amended. See *Yunus Ahmed v Docking Station Safaris (Pvt) Ltd t/a CC Sales* SC 70/18 at p 4, *Robert Dombodzvuku v CMED (Pvt) Ltd* SC 31/12 at p5 and *S v Jack* 1990 (2) ZLR 166 (S) at 167G.

The composite application that seeks condonation and leave to appeal would have been properly before me but for the defective and irredeemable ground of appeal embodied in the draft notice of appeal. Resultantly, the fatally defective notice of appeal renders the present application a nullity. In the circumstances, I cannot delve into the merits of the composite application. The application ought, therefore, to be struck off the roll.

Costs

In each of the preceding applications, the applicant has been mulcted with an adverse order of costs either on the ordinary scale or on the higher scale. Mr *Mapuranga* prayed for costs on a higher scale. In the opposing affidavit, the respondents sought costs *de bonis propriis* against Mr Ndudzo, the erstwhile legal practitioner of the appellant.

In its answering affidavit, the applicant defended Mr Ndudzo's admitted failure to appreciate the relevant provisions of the Supreme Court Rules, 2018. In his written and oral submissions Mr *Mapuranga* did not persist with a personal costs order against Mr Ndudzo. While the applicant's erstwhile legal practitioners have by their lack of diligence been the primary cause of the applicant's misery, there is a limit beyond which it can be absolved from the sins of its legal practitioners. See *Salooje & Anor NNO v Minister of Community Development* 1965 (2) 2 SA 135 (A) at 141C-E and *MM Pretorius (Pvt) Ltd & Anor v Mutyambizi* SC 39/12 at p 4.

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The applicant and its legal practitioners have had a period of three years to perfect its sole ground of appeal. Instead, all they have done is to put the two respondents out of pocket with procedurally defective applications. I would have granted costs *de bonis propriis* against Mr Ndudzo, had Mr *Mapuranga* sought them. I consider his lack of diligence in drafting the sole ground of appeal to be totally unacceptable. I, however, do not agree with Mr *Mapuranga* that this is an appropriate case to mulct the applicant with an adverse costs order on the scale of legal practitioner and client. This is because the applicant has not acted *mala fide* but in the genuine, though mistaken belief that the application was properly before me. I will, therefore, make an order of costs against the applicant on the ordinary scale.

Disposition

Accordingly, it is ordered that:

1. The application be and is hereby struck off the roll
2. The applicant shall pay the respondents' costs on the ordinary scale.

Mutamangira & Associates, the applicant's legal practitioners

Chambati Mataka & Makonese, respondents' legal practitioners

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