IN THE LABOUR COURT OF ZIMBABWE **JUDGMENT NO.LCH360/23**

HELD AT HARARE 29 NOVEMBER 2023 **CASE NO. LC/H/1/22**

AND 5 DECEMBER 2023

IN THE MATTER BETWEEN:

DHL INTERNATIONAL (PVT) LTD **APPLICANT**

AND

HARRY RUPAPA **RESPONDENT**

Before Honourable Mr. Justice L.M. Murasi

For Applicant **Mr. P. Dube**

No Appearance for Respondent

MURASI J.,

In a judgment dated 3 December 2021, this Court set aside the decision of the National Hearing Committee which had upheld the determination of the Hearing Committee. This Court went on to order Respondent's reinstatement failing which the Respondent was supposed to paid damages in lieu of such reinstatement. Applicant is dissatisfied with that decision. This is therefore application for leave to appeal to the Supreme Court in terms of section 92 (F) (2) of the Labour Act, (Chapter 28:01). I should point out that this application suffered various still-births when Applicant had failed to comply with the Rules of Court leading to the matter being struck off the roll.

Applicant's prospective grounds of appeal are as follows:

1. The Labour Court erred by failing to accept that there were no proper grounds of appeal before it which were based on a question of law and even grounds of appeal 7 and 8 which were purportedly relied upon by the Court did not raise proper appeal issues for the Court to determine.
2. Further, the Labour Court also erred by failing to consider that ground of appeal number 1 before it was in fact an admission by the Respondent on the proper fuel consumption of

the vehicle and therefore proved the charges levelled against him on a balance of probabilities that he was clearly abusing fuel by alleging that the vehicle would consume less than 5km per litre.

3. Lastly, the Labour Court also erred in overturning findings of both the disciplinary hearing committee and appeals committee on the basis that Appellant had failed to prove the charges on a balance of probabilities when there was undisputed documentary evidence which showed that the Respondent was guilty of the offence on a balance of probabilities.

At the hearing, Respondent was not in attendance despite having been duly served. The Court however, informed *Mr. Dube* for the Applicant, that it being an application for leave to appeal, he had to motivate the application.

Mr. Dube stated that he would abide by the documents filed of record and submitted that there was an arguable case which should be placed before the Supreme Court. His first port of call was that the Court had erred in granting the appeal after having accepted that the grounds of appeal had been badly drafted. He further pointed out that the grounds of appeal did not raise any question of law. Asked by the Court whether section 92D of the Act required that grounds of appeal be on points of law, *Mr. Dube* did not proffer a meaningful response.

Mr. Dube further submitted that there was an admission by the Respondent as to the usage of fuel as shown in the first ground appeal brought before the Court and the Court had disregarded this fact. He also argued that the Court had erred in failing to find that the misconduct had been proved on a balance of probabilities as shown in the documentary evidence that had been produced before the Hearing Committee. The Court enquired of *Mr. Dube* what points of law were being raised in the prospective grounds of appeal which should be placed before the Supreme Court for determination. The following exchange took place:

"Court: What are you relying on- is it a misdirection on the facts

A: Misdirection on the facts.

Court: It is not pleaded, this means that the ground of appeal is meaningless.

A: It can be cured by an application for an amendment."

ANALYSIS

In **Leah Nachipo and Gerald Nachipo vs Admire Maticha and 5 Others** SC 72/22, GUVAVA JA had this to say:

"It should always be borne in mind that, the rationale which is considered by this court is that, a wholly unrestricted right to appeal from every judicial decision by a lower court, is frowned upon and may have serious consequences. For instance, a wealthy party may, at every turn, and every ruling appeal thus causing immense problems and a grave injustice upon the other party who may not be so well heeled."

In **Essop v S** (2016) ZASCA 114, it was held as follows:

> "What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

I will begin with the prospective grounds of appeal. It is common cause that section 92 F provides that in an appeal from the Labour Court to the Supreme Court, such appeal should be on points of law. It is also common cause that precedent has, in many a decision provided directions as to what amounts to points of law. This issue was aptly summarized by MAKARAU JA (as she then was) in **Zimbabwe Institute of Management v Roderick Nhamo Kadungure** SC 115/20 where she this to say at page 6 of the cyclostyled judgment:

> "It is my understanding from the above authorities that broadly speaking, an appeal from the Labour Court to this Court is competent only if it questions what the law has said in other binding cases on the issue to be determined, presumably in matters where the court has discretion, or questions what the law is on the specific issues raised in the appeal or attacks the decision a quo on the facts as being irrational. The remit of this court in determining appeal from the court a quo is therefore fairly narrow.
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> Put differently, the broad position of the law is that an appeal from the court a quo to this Court must call upon this Court to determine and pronounce on the correct and true rule of the law on the matter in dispute or, if based on the facts of the matter, to set aside the decision as being irrational. It cannot invite this court to revisit the entire dispute and exercise a fresh discretion in the matter."

The Court asked *Mr. Dube* to shed light on whether any of the three prospective grounds of appeal raised any points of law. His responses did attempt to answer the question posed by the Court. Indeed, it was not possible to justify any of the grounds of appeal as raising any points of law. The first ground of appeal shows a lack of understanding of what was needed to plead in the first place. The ground of appeal confuses the issue of some grounds of appeal not being on points of law and the others not raising proper 'appeal issues.' One cannot, in the circumstances understand what the Applicant intends to place before the Supreme Court for determination. I should point out that section 92D does not require that a ground of appeal raise a point of law. Such requirements are found in sections 92 F (1) and 98 (10) of the Act. The Legislature must therefore be understood to have clearly omitted this requirement in section 92D. The feeble argument tendered by *Mr. Dube* that the grounds of appeal must be on points must therefore be

rejected. Secondly, in respect of the first ground of appeal, Applicant appears to have ignored the Court's judgment in respect of the grounds of appeal. The Court stated as follows:

> "The second to the sixth grounds of appeal fall into the two categories and the Court will not deal them.
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> The remaining grounds of appeal deal mainly with a single issue, that is, whether there was sufficient evidence to prove the case on a balance of probabilities."

The Applicant does not deal with the above findings by the Court.

The second ground of appeal raises an interesting scenario. Applicant argues that Respondent's first ground of appeal should have been taken by the Court as an admission. Logically, a ground of appeal is a pleading. It is a protestation on how an issue was decided. The Applicant puts forward the argument that in its view, this amounted to an admission which should have been taken as such by the Court. It is indeed an ingenious argument which requires no further comment. The issue that however arises is whether the ground of appeal raises a point of law. Applicant does not rely on a misdirection by the Court. The Applicant does not point to irrationality. Both are not pleaded. Mr. Dube sought to rely on the fact that an application would be made in future for a possible amendment to the ground of appeal. I should point out the fact that the Supreme Court relies on this Court to make a value judgment on whether an appeal is meritorious or not. In the absence of valid grounds of appeal being place before it, this Court will therefore be incapacitated from carrying its duty in this regard.

The third ground of appeal also makes sad reading. No misdirection on the facts is pleaded. No irrationality is pointed out. It falls into the category of the first two grounds of appeal. The last issue I wish to state as regards the prospective grounds of appeal is that they lack the requirement of specificity as outlined by GARWE JA (as he then was) in **Dr. Nobert Kunonga v The Church of the Province of Central Africa** SC 25/17. It is my considered view that they not proper grounds of appeal and cannot be placed before the Supreme Court for determination.

The second issue arises from the determination made by this Court on the facts. At page 6 of the judgment, this Court made the following observations:

> "A reading of the record and charges shows the following:
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> There was no documentation showing the trips Appellant embarked upon.
> There was no document showing that Appellant was given specific instructions to make specific deliveries.
> The distances that Appellant was supposed to cover during those deliveries were not provided.
> Most importantly, the document from the manufacturer showing the consumption rate of the motor vehicle in question was not produced and availed to the Hearing Committee.

Most of the figures given as fuel consumption are therefore estimates."

It has not been suggested by the Applicant that this crucial evidence which was required to prove the case on a balance of probabilities was adduced and that this Court misdirected itself in ignoring it. As stated in the **Essop Case** supra, an applicant needs to show more than that the case was arguable. There must be realistic prospects of success. Applicant has been unable to show those prospects of success on appeal. The application ought to be dismissed.

In the result, the application for Leave to Appeal to the Supreme Court is accordingly dismissed with no order as to costs.

Dube, Manikai & Hwacha- Applicant's legal practitioners.