REPORTABLE (23)

EDWARD MUDYAVANHU
v
CAIRNS FOODS LIMITED

SUPREME COURT OF ZIMBABWE
MAKONI JA, MATHONSI JA & CHATUKUTA JA
HARARE: 30 OCTOBER 2023

The appellant in person

D. Peneti for the respondent

MAKONI JA:

1. This is an appeal against the whole judgment of the Labour Court of Zimbabwe (the court *a quo*) sitting at Harare dated 27 July 2022. After hearing submissions from the appellant and counsel for the respondent, the court dismissed the appeal with costs indicating that reasons for the order would be given in due course. These are the reasons.

FACTS

2. The appellant was employed by the respondent as a Management Accountant. In 2001, his employment was terminated after a restructuring exercise. The appellant challenged the termination. The challenge resulted in a judgment handed down by MAKAMURE J on 13 April 2004 under LC/H/35/2004 who ruled that the appellant had been wrongfully dismissed from employment and ordered that he be paid damages as compensation for the wrongful dismissal.

3. In 2009, the appellant filed an application for quantification of damages in the Labour Court. In a judgment handed down on 27 May 2009, MHURI J quantified the damages payable in the total amount of Zimbabwean dollars $26 076 252.00.

4. In 2020, the appellant approached the High Court seeking registration of the judgment by MHURI J. DUBE J (as she then was) struck the matter off the roll. She found that the matter was improperly before the court as the award was denominated in Zimbabwean dollars which was no longer a usable currency during the period in question.

5. Following the striking off of the matter from the roll by the High Court, the appellant approached the Labour Court, again, under case number LC/H/APP/43/20 seeking an order for the evaluation of his salaries and benefits owed to him by the respondent. In that application, the appellant sought a variation of his damages which had been quantified in 2009 in Zimbabwean dollars to be varied to reflect a *quantum* of 'Zimbabwean dollars as they are currently valued'.

6. MANYANGADZE J, in dealing with the application, struck the matter off the roll on 3 July 2020, for the reason that it was improperly before the court as the appellant sought relief which had already been rendered by the court.

7. In September 2021, the appellant sought to contest the judgment by MANYANGADZE J, by way of appeal. He sought condonation for late filing of an application for leave to appeal as he was out of time. The application was made under case number LC/H/462/21. The application was struck off the roll by CHIVIZHE J for failure to meet the requirements of an application for condonation.

PROCEEDINGS IN THE COURT *A QUO*

8. The appellant then proceeded to make an application, in terms of para 5 of Practice Direction 3 of 2013 (Practice Direction), under case number LC/H/206/22, for reinstatement of LC/H/APP/43/20 which had been struck off the roll by MANYANGADZE J on 3 July 2023. The application for reinstatement was opposed by the respondent who averred that in terms of rule 36 of the Labour Court Rules, the appellant had thirty days within which to apply for the reinstatement of LC/H/APP/43/20. In this regard, the respondent argued that the appellant was out of time to seek the reinstatement he sought. The respondent also opposed the application on the basis that the application before MANYANGADZE J had been struck off the roll because it had been made on the basis of a subject matter which had already been disposed of by the same court. The respondent thus argued that reinstating the application would not result in any tangible result.

9. On 27 July 2022, CHIVIZHE J dealt with the application for reinstatement and found that the Practice Direction was introduced with a view to ensuring the uniform use of legal terms and the application of those terms in the Superior Courts. The court noted that the Practice Direction was not created to replace court rules and as such para 5 of the Practice Direction had to be read together with r 36 of the Labour Court Rules, 2017. In this regard the court found that as the appellant's matter had been struck off the roll because of a jurisdictional basis and not on the basis of failure to comply with rules, the court was *functus officio.* The matter could not therefore be reinstated in terms of para 5 of the Practice Direction.

10. The court further found that the appellant's recourse was in r 36 of the Labour Court Rules. The court, however, noted that the appellant could only resort to that rule within 30 days of becoming aware of the abandonment of his matter and that in the circumstances of the case the appellant had brought his matter two years after the last order was issued. The application was thus struck off the roll.

THE APPEAL

11. Dissatisfied by the decision of the court *a quo*, the appellant noted the present appeal on the following grounds of appeal:

GROUNDS OF APPEAL

"i. The learned judge erred at law in deciding the matter on the basis of procedural technicalities when the parties had revealed to the court a consensual position for resolution of matters on the basis of merits.

ii. Applying the requirements of rule 36 of the Labour Court Rules 2017 in a matter that is under the regulation of, and was brought to court in terms of paragraph 5 of the Superior Courts Practice Direction 3 of 2013."

The appellant sought the following relief, that;

"1. The appeal be allowed with costs.

2. The Labour Court order LC/ORD/499/2022 be set aside and substituted with the following:

   i. The application in case number LC/H/APP/43/20 – for valuation, on the basis of the prevailing currency, of salaries, benefits and severance pay owed to Applicant by Respondent- be, and is hereby, reinstated to the roll.

   ii. The Registrar be and is hereby ordered to set the matter down for hearing at the earliest convenience.

iii. Respondent to pay cost of suit."

PROCEEDINGS BEFORE THIS COURT

12. The appellant argued that the court *a quo* erred in refusing to grant the application for reinstatement of case LC/H/APP/43/20 which was his only remedy in view of the fact that it was struck off the roll. He further argued that the court erred as his remedies for reinstatement were provided for in the *proviso* to para 5 of the Practice Direction.

13. The Court explained to the appellant that the application which he sought to reinstate had been struck off the roll because the court did not have jurisdiction to deal with the matter on the basis that it was *functus officio.* The issue had already been dealt with by MHURI J.

14. The court also directed the appellant's attention to the fact that paragraph 5 of the Practice Direction could not apply to the matter in *casu*. It could only be resorted to in instances where a matter is struck off the roll for infractions of the rules.

15. The appellant maintained that the court *a quo* erred in striking his matter from the roll and that he had a remedy to reinstate his matter under the *proviso* to para 5 of the Practice Direction.

16. *Per contra*, Mr *Peneti*, for the respondent, argued that the reinstatement which was sought by the appellant could not be attained as he could not reinstate a matter where the Labour Court had already pronounced itself on the issue at hand.

17. Mr *Peneti* further argued that the court *a quo* did not err in finding that the Practice Direction could not be used to reinstate the matter. With that counsel prayed that the appeal be dismissed with costs.

ISSUE FOR DETERMINATION

18. Whether or not the court *a quo* erred in striking off the roll the appellant's application.

APPLICATION OF THE LAW TO THE FACTS

Whether or not the court *a quo* erred in striking off the appellant's application.

19. The court *a quo* struck off the appellant's application for reinstatement on the basis that the applicant wrongly applied the Practice Direction in making the application. The court *a quo opined* that the appellant's matter, having been struck off the roll in 2020, had been deemed abandoned and the appellant could only therefore, in the circumstances, have recourse to r 36 of the Labour Court Rules, 2017. It was also the court *a quo*'s position that r 36 required the application to have been made within 30 days of the party becoming aware of the abandonment. The application was brought two (2) years after the last order and it was on that basis that the court struck the application off the roll.

20. The appellant's position is simply that because MANYANGADZE J, for whatever reason, ultimately struck his matter off the roll, his remedies lie in the Practice Direction. In his application before the court *a quo* and his initial submissions he relied on the entire para 5 of the Practice Direction. After the intervention of the court regarding the applicability of that paragraph he then sought to rely, only, on the *proviso* to para 5.

The Practice Direction 3 of 2013, which provides for the meaning of the phrase 'struck off the roll', provides as follows, in the relevant parts:

> "3. The term shall be used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place.

4. In accordance with the decision in Matanhire vs. BP & Shell Marketing Services (Pvt) Ltd 2004 (2) ZLR 147 (S) and S vs. Ncube 1990 (2) ZLR 303 (SC), if a Court issues an order that a matter is struck off the roll, the effect is that such a matter is no longer before the Court.

5. **Where a matter has been struck off the roll <u>for failure by a party to abide by the Rules of the Court,</u> the party will have thirty (30) days within which to rectify the defect, failing which the matter will be deemed to have been abandoned.**

<u>Provided that a Judge may on application and for good cause shown, reinstate the matter, on such terms as he deems fit.”</u> (own emphasis)

21. It was the appellant’s argument that the *proviso* allows a party to seek reinstatement, and that a Judge can grant the application on ‘good cause shown’. He contended that the general provision, that is para 5, which makes reference to failure to abide by the rules, and r 36 relied on by the court *a quo* did not apply.

22. In the case *R v Dibdin,* 1910 **Probate** at 57, LORD FLETCHER MOULTON at p 125, in the Court of Appeal, said:

> “The fallacy of the proposed method of interpretation (i.e. to treat a *proviso* as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a *proviso* must be considered in relation to the principal matter to which it stands as a *proviso.* It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in such cases as *Ex parte* Partington, 6 Q.B. 649; In re Brockelbank, 23 Q.B. 461, and Hill v East and West India Dock Co., 9 App. Cas. 448, have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a *proviso*.”

23. A *proviso* cannot be treated as an independent clause but has to be considered in relation to the principal matter to which it stands as a *proviso*. The argument by the appellant that he was only relying on the *proviso* to para 5 ‘sins against the fundamental rule of construction that a *proviso* must be considered in relation to the principal matter to which it stands as a *proviso*.’ Reliance by the appellant on the *proviso* was totally misplaced. In

any event the appellant's application *a quo* was not made in terms of the *proviso.* It was made in terms of the entire para 5. The appellant could therefore not change the basis of his application *a quo* on appeal.

24. A point to note is that the order by MANYANGADZE J was in three paragraphs. It reads;

> In the result, it is ordered that:
>
> 1. The point *in limine* raised by the respondent be and is hereby upheld,
> 2. The application for valuation of salaries, benefits and severance pay be and is hereby struck off the roll.
>
> 3. Each party bears its own costs.

25. The point *in limine* related to whether the application filed by the appellant, before the court *a quo*, was properly before it in view of the fact that the same issue had been determined by the same court. The appellant completely steered away from addressing the effect of para 1 of the order by MANYANGADZE J despite being directed to it. He stuck to his argument that, eventually, the matter was struck off the roll and that is what he has to deal with.

26. He deliberately avoided dealing with that issue as it became clear that the matter could not be reinstated as the Labour Court lacked jurisdiction to deal with it as it had become *functus officio*. The court, rightly or wrongly, made a final ruling on the matter and as such cannot revisit its own decision. In *Rodgers v Chiutsi* SC 25/22, it was held on p 9 as follows:

> "Thus, unlike a provisional order, a final order is conclusive and dispositive of the dispute. It finally settles the issues in dispute and has no return date. Once a final order is given the court issuing the order becomes *functus officio* and cannot revisit the same issues at a later date."

27. In *Matanhire v BP Shell Marketing Services (Pvt) Ltd* 2005 (1) ZLR 140 (S) at 146C-F the court in discussing the *functus officio* principle held that:

> "The law on this point is very clear in that once a matter has been finalised by a court that court becomes *functus officio*. It has no authority to adjudicate on the matter again. The only jurisdiction that a court has is to make incidental or consequential corrections. The position was stated as follows in the case of *Kassim v Kassim* 1989 (3) ZLR 234(H) at p 242 C-D where it was stated that:-
>
> > 'In general, the court will not recall, vary or add to its own judgment once it has made a final adjudication on the merits. The principle is stated in *Firestone South Africa (Pty) Ltd v Genticuro Ag* 1977 (4) SA 298 (A) at 306, where TROLLIP JA stated:
> >
> > The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.'"

28. Also in the case of *Unitrack (Pvt) Ltd* v *TelOne (Pvt) Ltd* SC 10/18 on p 4 this Court held that:

> "It is a general principle of our law that once a court or judicial officer renders a decision regarding issues that have been submitted to it or him, it or he lacks any power or legal authority to re-examine or revisit that decision. Once a decision is made, the term "*functus officio*" applies to the court or judicial officer concerned"

29. From the above analysis it becomes apparent that the court *a quo,* in striking off the appellant's application, was correct even though it did so for the wrong reasons. The order of the court *a quo* is correct and it is trite that an appeal must be directed at the order and not the reasoning of the court. See *Chidyausiku v Nyakabambo*. 1987 (2) ZLR 119 (S) 124C.

30. It was for those reasons that the court found that the appeal had no merit and issued the following order:

> "The appeal be and is hereby dismissed with costs."

MATHONSI JA : I agree

CHATUKUTA JA : I agree

Maguchu & Muchada Business Attorneys, respondent's legal practitioners.