REPORTABLE (126)

GODFREY MUGARI
v
CHINHOYI UNIVERSITY OF TECHNOLOGY

SUPREME COURT OF ZIMBABWE
HARARE, 31 AUGUST 2023

N. V. Chizodza, for the applicant

S. Mushonga, for the respondent

CHAMBER APPLLICATION

CHITAKUNYE JA. This is an opposed chamber application for condonation for late filing of an application for leave to appeal and leave to appeal in terms of r 60 and 61 of the Supreme Court Rules 2018. At the conclusion of hearing on 31 August 2023, I gave an *ex-tempore* judgment dismissing the application with costs. The applicant has requested for the written reasons for the decision. These are they.

THE FACTS.

The applicant was formerly employed by the respondent as a lecturer. In 2018 he was charged with four counts of misconduct. The disciplinary proceedings were conducted in terms of the Labour (National Employment Code of Conduct) Regulations 2006, Statutory Instrument 15 of 2006. He was duly convicted of two of the counts and acquitted of the other two counts by an internal Disciplinary Authority.

Dissatisfied with the internal Disciplinary Authority's determination on the two counts upon which he was convicted and dismissed from employment, he appealed to an internal Appeals Committee which upheld the Disciplinary Authority's decision.

Further dissatisfied by the decision of the Appeals Committee he referred the matter to a labour officer and eventually to the Labour Court. The Labour Court's decision was not to his satisfaction hence he appealed to this Court in SC 236/20.

On 13 November 2020 this Court issued an order by consent setting aside the proceedings that had been undertaken before the labour officer and the Labour Court as such proceedings were held to have been nullities.

The applicant thereafter filed a new appeal to the Labour Court against the determination of the internal Disciplinary Authority and the upholding of that decision by the internal Appeals Committee. On 8 February 2022 the Labour Court dismissed the applicant's appeal in an *ex-tempore* judgment. Upon his request, written reasons for judgment were provided on 11 March 2022. The applicant belatedly sought leave to appeal but that initial application was struck off the roll as he was out of time and had not sought condonation for the late filing of such an application.

The applicant subsequently filed an application for condonation for failure to seek leave within the period prescribed by the rules and for leave to appeal in the Labour Court on 23 June 2022. That application was dismissed by the Labour Court on 6 June 2023.

In terms of the proviso to r 60 (2) of the Supreme Court Rules, 2018, the applicant had ten (10) days within which to approach this Court for leave to appeal against

the Labour Court's judgment from the date of the dismissal of his application by the Labour Court.

The applicant's initial application in SC 378/23 was fatally defective and was struck off the roll on 27 June 2023. The current application was filed on 8 August 2023 which was way outside the period by which such an application ought to have been filed. It is in view of this that the applicant seeks condonation for failure to file the application for leave to appeal within the prescribed period and for leave to appeal.

The application is opposed. In its opposition the respondent contended, *inter alia,* that the delay is inordinate and that there is no reasonable explanation for the delay. It also contended that there were no prospects of success on appeal. It thus prayed for the dismissal of the application.

THE LAW

It is trite that in an application for condonation for non-compliance with the rules, an applicant is obligated to demonstrate to the court that he or she has good cause for the grant of the relief. The applicant is required to, *inter alia*, provide a reasonable explanation for the delay and for non-compliance with the rules and also to show that there are good prospects of success on appeal. In *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) GUBBAY CJ set out factors to be considered in such an application as including:

> "(a) That the delay involved was not inordinate, having regard to the circumstances of the case;
> (b) That there is a reasonable explanation for the delay;
> (c) That the prospects of success should the application be granted are good; and
> (d) The possible prejudice to the other party should the application be granted."

See also *Machaya v Munyambi* SC 4/05*; Easter Mzite v Damafalls Investments (Pvt) Ltd* SC 21/18.

These factors are not individually decisive on whether the application for condonation for non-compliance with the rules is granted. They are considered cumulatively. In *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S), SANDURA JA remarked as follows:

> "Whilst the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus, in the case of a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be."

See also: *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (SC) at 357

ISSUES FOR DETERMINATION

1. Extent of the delay and whether the explanation for such delay is reasonable.
2. Whether there are good prospects of success in the envisaged appeal.
3. Whether there is prejudice to be suffered by the other party if condonation is granted.

APPLICATION OF THE LAW TO THE FACTS

1. Extent of the delay and Reasonableness of the explanation.

It is incumbent upon the applicant to give an explanation for the failure to act in terms of the dictates of the rules. In *casu*, the judgment which the applicant seeks to appeal against was handed down on 8 February 2022. The application for leave to appeal in the court *a quo* was dismissed on 6 June 2023. In terms of the proviso to r 60 (2) of the Supreme Court Rules, the applicant had ten (10) days within which to seek leave to appeal from this Court. The applicant ought to have sought leave to appeal from this Court by 20

June 2023. This application was filed on 8 August 2023. The applicant is thus 35 days out of time. In the circumstances the applicant is required to proffer a reasonable explanation for the entire period of the delay. Whether such a delay is inordinate or not depends on the circumstances of each case.

In his founding affidavit the applicant lamentably failed to provide any explanation for the delay in this period. In none of the 25 paragraphs of the founding affidavit did the applicant make any reference to the delay and reasons thereof in noting the present application. He instead concentrated on the history of the dispute with the respondent up to the court *a quo's* dismissal of his application for condonation for late noting of application for leave to appeal and for leave to appeal to this Court.

Though no mention is made in the founding affidavit of any supporting affidavit, attached to the application is an affidavit by a legal practitioner, *Rebecca Mhawa*, attempting to explain some of the causes for the delay. That affidavit falls short of what is expected in that the deponent thereof simply alludes to bleeps and blunders occasioned in her office in drafting and filing a similar application in SC 378/23 which was struck off the roll on

27 July 2023 for being fatally defective. There is nothing said about why it then took applicant up to 8 August 2023 to file the present application.

I am of the view that whilst the delay may not seem inordinate, the lack of explanation for some of the periods is disconcerting. It is as if the applicant took it for granted that explaining the history of the case will suffice to get the court's sympathy. The applicant has not given any reason for the delay in seeking leave from this Court after his application before the court *a quo* was dismissed. Instead, the applicant explains why he

delayed seeking leave from the court *a quo*, and how the first application he made before that court was struck off the roll for being made out of time without seeking condonation for the delay. In *Zimslate Quartzite (Pvt) Ltd & Ors v Central African Building Society* SC 34/17 at p 7 this Court aptly stated that:

> "An applicant, who has infringed the rules of the court before which he appears, must apply for condonation **and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought.** An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed." (My emphasis)

Furthermore, in *Lunat* v *Patel* SC 47/22 at p 6, CHATUKUTA JA held that:

> "A party seeking condonation and extension of time must satisfy the court that **a valid and justifiable reason exists as to why compliance did not occur and why non-compliance should be condoned.** Further, regardless of the prospects of success, a court may decline to grant condonation where it considers the explanation for failure to comply with the rules unacceptable." (My emphasis)

In view of the fact that the applicant has not explained his failure to file the current application within the prescribed time limits, based on the authorities above, I am of the view that the applicant has failed to give a reasonable explanation for his failure to comply with the rules of Court. He in fact has not given any explanation for some of the periods relative to this application.

2. Prospects of success in the envisaged appeal.

The applicant's grounds of appeal mostly allude to a dissatisfaction with the court *a quo's* findings leading to the dismissal of his appeal. Some of the grounds are on findings of fact and not on questions of law. It would appear that the need to clearly raise grounds of appeal on questions of law were lost in his gripe with the court *a quo's* decision.

In *Sheckem Ngazimbi v Murowa Diamonds (Pvt) Ltd* SC 27-13, this Court explained the purpose of an application for leave to appeal as follows:

> "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."

The question is thus whether there are prospects of success in those grounds that relate to questions of law.

Prospects of success refer to the question of whether the applicant has an arguable case on appeal. In *Essop v S*, [2016] ZASCA 114, the court in defining prospects of success held that:

> "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 a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal." (My emphasis)

In *Chikurunhe v Zimbabwe Financial Holdings* SC 10-08 the Court held that:

> "The party seeking leave must show, *inter alia*, that he has prospects of success on appeal. In other words, leave is not granted simply because a party has sought such leave."

In *casu*, the applicant intends to appeal against the judgment of the court *a quo* on the basis that the court erred by failing to uphold his grounds of appeal against the lower tribunals disciplinary process that resulted in his being dismissed from employment which he alleged was flawed. The applicant avers that his right to be heard or to respond to the investigations, the right to an informed response, and the right to meaningful legal

representation were violated. The applicant also claims that he was denied the right to defend himself, the right to call witnesses, and the right to request documents with which he could defend the charges against him.

The court *a quo* held that upon his suspension from work being lifted, the applicant failed to report for duty. The court further held that the applicant's legal practitioner walked out of the hearing and failed to challenge the evidence against the applicant hence the applicant could not blame anyone for that.

In Zesa *Enterprises (Pvt) Ltd v Stevawo* SC 29/17 at p 4, it was held that:

> "The right to be heard is a fundamental cornerstone of our law. It is a fundamental principle of the rules of natural justice forming the backbone of a fair hearing enshrined in our constitution as read with the Administrative Justice Act [*Chapter 10:28*]. The maxim that no one shall be condemned without being heard holds sway in our law."

In that case the Court went on to qualify the right to be heard as follows:

> "The right to be heard is, however, not an absolute immutable rule of law. It can be waived or forfeited where the beneficiary is at fault….. Professor G. Feltoe in his booklet, *A Basic Introduction to The Administrative Law of Zimbabwe*, states at p 18, that the principle of natural justice can be waived when he says:
>
> > 'Clearly when a person is offered the chance to exercise one of the rights recognized as being part of the principles of natural justice and he declines to avail himself of this right, then he has waived his right.'"

Further, in *David Moyo v Rural Electrification Agency* SC 4/14 ZIYAMBI JA had this to say concerning an employee who had failed to attend a disciplinary hearing despite knowledge thereof:

> "In our view the appellant, by deliberately absenting himself without leave from the hearing, waived his right to challenge the conduct of the disciplinary proceedings."

In *casu*, it is common cause that the applicant was suspended from employment after which the suspension was lifted within three days of the date of

suspension. The applicant was thereby required to report for duty. The letter lifting the suspension was served at his residential address which he had provided. He did not report for duty hence disciplinary proceedings were instituted. The applicant was notified of the disciplinary proceedings against him and the date of the hearing. Whilst the applicant was not present in person, as he averred that he had left for China upon being suspended, he was legally represented by a legal practitioner of his choice. It is not disputed that the appellant left for China without the respondent's authority. The applicant submitted a written response to all the charges against him. His legal practitioner, Mr Choga, duly attended the disciplinary hearing whereat he presented the applicant's written response to all the charges and this was accepted by the disciplinary authority. However, when the legal practitioner's request for a 7 months long postponement of the hearing was rejected, the legal practitioner left the hearing before it ended on the basis that he had no further instructions from his client. As a result, the applicant failed to challenge the evidence placed before the disciplinary authority. In the circumstances, it cannot be said that the applicant was denied the right to be heard and to defend himself. Such right was accorded to him and subsequently waived by his legal practitioner when he walked out of the disciplinary hearing.

In *casu*, the applicant chose to leave for China at a time he was on suspension without obtaining authority from the respondent. The applicant's contention seemed to be oblivious of the legal effect that a suspension does not release an employee from his contract of employment or grant him the authority not to avail oneself when required by the employer.

In *Gladstone v Thornton's Garage* 1929 TPD 116 the court stated that:

> "When an employee is suspended it appears to me that apart from any express instructions, he must hold himself available to perform his duties if called upon; though for the time being he is debarred from his work. It appears to me that that is distinct from dismissal-the use of the term 'suspended' is an indication that, while he

> is not to perform his duties, he must still remain bound to his employer under his contract of service."

In *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* 1988 (1) ZLR 143 (SC), GUBBAY JA (as he then was) aptly confirmed this position in this jurisdiction as follows:

> "Plainly the obligation of an employee who is placed under suspension to hold himself available to performing his duties if called upon to do so, is one which arises by operation of law. It is of no consequence therefore that no provision in that regard is contained in the contract of service; and it is not necessary for the employer at the time of suspension to so inform the employee."

The applicant by leaving for China deliberately made himself unavailable to report for duty and to even attend the disciplinary hearing in person. It was in this scenario that he appointed a legal practitioner to represent him. His legal practitioner presented his written response to the charges. Unfortunately, the legal practitioner thereafter opted to walk out of the hearing. The opportunity to argue the applicant's case and even cross examine witnesses was there for the taking but he opted to leave. Clearly this is a situation where the applicant was afforded what he now craves for but opted not to take it at the time. It cannot therefore be said that he was denied an opportunity to participate in the disciplinary proceedings.

There are clearly no prospects of success on appeal against the court *a quo's* decision dismissing the applicant's appeal in the circumstances.

The application ought to fail on that basis.

DISPOSITION

The applicant failed to give a reasonable explanation for the delay in seeking leave to appeal from this Court and there are no prospects of success. With these findings it

is unnecessary to consider prejudice to the respondent should the application succeed. The above reasons were the cornerstone of my decision to dismiss the appellant's application for condonation for late noting of an application for leave to appeal and for leave to appeal.

Accordingly, the application was dismissed with costs.

Jakachira, Chizodza & Company, applicant's legal practitioners

Mushonga & Associates, respondent's legal practitioners.