REPORTABLE (108)

GRACE CHITAMBIRA
v
MEGA PAK ZIMBABWE LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, 27 SEPTEMBER 2023 & 13 OCTOBER 2023

The applicant in person

S. Sadomba, for the respondent

IN CHAMBERS

MATHONSI JA: This is a conjoined application for condonation and extension of time in which to file an application for leave to appeal against the judgment of the Labour Court ("the court *a quo*") delivered on 30 January 2023. The application follows the refusal of leave to appeal by the court *a quo* in a judgment delivered on 10 July 2023.

The application for condonation has, conjoined to it, an application for leave to appeal made in terms of r 60 as read with r 61 of the Supreme Court Rules, 2018. Initially the respondent objected to the composite application arguing that such procedure was alien to the rules of court, suggesting that the applicant should have first sought condonation and, if granted, she would then file a separate application for leave to appeal.

Happily, Mr *Sadomba* who appeared for the respondent, abandoned that objection at the commencement of the hearing of the application. I must say that the abandonment was proper

because there is absolutely nothing untoward in conjoining the two matters. The rules of court do not preclude it and it appears to be the most expedient way of disposing of such matters instead of dealing with them piece meal.

I however qualify that assertion by observing that the second application, that of leave to appeal, is predicated upon the success of the first application, that of condonation because without it there would be no application for leave. That view rhymes with the remarks of GWAUNZA JA (as she then was) in *Chomurema & Anor v Telone* SC 86/14 at p 7, that:

> "The learned judge, however then fell into the error of not fully appreciating the implications of this default *visa-vis* the application for leave to appeal to the Supreme Court. This was that, absent an application for condonation of the late filing of the application for leave to appeal, there was nothing before the court to dismiss. The latter application could not stand on its own, being premised on nothing. Secondly, since the dismissal in question was in my view incompetent, there would have been nothing to prevent the court from hearing the two applications. Thus, nothing was dealt with 'to finality."

All is well that ends well. In the same spirit, Mr *Sadomba* also accepted that condonation of the late filing of the application for leave to appeal be granted in order to pave way for the hearing of the main application on the merits. I then promptly condoned the late filing by consent.

That is where the good spirit ended. The applicant had her own preliminary point to take. Self-representing, she raised the issue of the absence of authority for the deponent to the opposing affidavit, Champion Mutimukulu, to represent the respondent. In deposing to the opposing affidavit, Mutimukulu stated that he is "the Respondent's Operations Director … duly authorized by the Respondent to depose to this affidavit …."

The applicant submitted that the assertion in question was insufficient. In her view,

as an employee of the respondent, the deponent had to exhibit proof of authority given to him to depose to the affidavit. After engagement with Mr *Sadomba*, he conceded that having been challenged, the authority of the deponent had to be produced.

The question of whether a board resolution authorizing the deponent of an affidavit filed on behalf of a company should be filed is well-beaten ground. After reviewing a line of case authorities in *Dube v Premier Service Medical Aid Society & Anor* SC 73/19, GARWE JA (as he then was), re-stated the law succinctly at para 38 thus:

> "[38] The above remarks are clear and unequivocal. A person who represents a legal entity, when challenged, must show that he is duly authorized to represent the entity. His mere claim that by virtue of the position he holds in such an entity he is duly authorized to represent the entity is not sufficient. He must produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity. I stress that the need to produce such proof is necessary only in those cases where the authority of the deponent is put in issue. This represents the current state of the law in this country." (My emphasis)

I am aware that Mutimukulu is the one who investigated the issue of the applicant's misconduct and dealt with the applicant from its inception. In fact, throughout her address during the hearing, the applicant kept referring to him as the person who handled the case on behalf of the respondent. I am also mindful that the applicant challenged the authority of Mutimukulu after the opposing papers had been filed, meaning that the respondent no longer had an opportunity to provide proof outside the confines of the hearing.

It was with that in mind that I directed the respondent to file the board resolution by end of the day on 27 September 2023 and proceeded to hear the parties subject to its production. I confirm that at the time of preparing this judgment, the respondent had uploaded the board resolution authorizing Mutimukulu to represent it in these proceedings. The applicant remained adamant that there was no authority in further submissions she filed after the resolution was supplied. I do not

agree. As I have already said, the applicant has always dealt with Mutimukulu as the representative of the employer. Her objection is not only dishonest in the extreme but also unfounded. Nothing more needs to be said about that issue. I proceed to determine the application.

THE FACTS

There is not much divergence between the parties on the facts which are generally common cause. The applicant was employed by the respondent. Following her absence from work between 13 and 30 December 2021, she was charged with three counts of misconduct namely:

(a) Absenteeism in contravention of s 4.1 of the Code of Conduct;

(b) Uttering or attempting to utter fraudulent documents or supply false documents in contravention of s 4.3.4 (b) of the Code of Conduct; and

(c) Any act of conduct or omission that amounts to a breach or repudiation of contractual obligations in contravention of s 4.5.6 of the Code of Conduct.

The allegations were that she absented herself from work during the period extending from 13 to 30 December 2021. On being asked to justify her absence from work on 29 December 2021, she tendered an off-sick medical certificate issued by Ruwa Family Clinic on 27 December 2021. The certificate recorded that she had attended at that health institution on that date for examination and treatment and was "unfit for duty from 13 December 2021 to 30 December 2021." The employer immediately queried the contents of the medical certificate given that it certified the applicant unfit for work from 13 December 2021 when she was only examined on 27 December 2021.

Doctor S. Maenzanise of the health institution explained in a letter to the employer dated 3 January 2021 that indeed the applicant had only been attended to on 27 December 2021 and that prior to that date she had last been to the health institution on 29 October 2021. The good doctor went on to explain that

he had had discussions with the doctor who issued the medical certificate and impressed upon him or her that "we do not give medical certificates for medical conditions which we did not attend at our surgery."

Needless to say, the applicant was then in a state of bother having submitted a problematic medical certificate for which no satisfactory explanation had been given. The applicant then produced a second medical certificate authored by Dr S. Maforo, ostensibly on 12 December 2021, stating that she was given sick leave for the period extending from 13 to 24 December 2021. It offered cold comfort to the applicant because it was common cause that she had met her supervisor on 13 December 2021 during which meeting she was advised to seek medical attention as she complained of being unwell.

It was also common cause that during that meeting she did not disclose to her supervisor that she had already sought medical attention the day before and had already been given time off until 24 December 2021. More importantly, the applicant had not submitted Dr Maforo's medical certificate to her supervisor on 13 December 2021 if indeed she was already in possession of it. In fact, she only produced it several days later after the 27 December 2021 certificate had been queried.

A disciplinary hearing was convened by the disciplinary committee on 21 January 2022. Faced with the above set of facts the disciplinary committee made a number of pointed factual findings. It found that the applicant had been absent from work from 13 to 30 December 2021 without communicating her whereabouts to her supervisor. It found further that, even though her supervisor had advised the applicant to seek medical attention if she was unwell, she did not communicate to the supervisor the outcome until she was contacted on 29 December 2021 even though she had ample opportunity to do so.

The disciplinary committee concluded that the applicant was absent from work without reasonable cause during the period extending from 13 to 28 December 2021 and found her guilty of absenteeism in breach of s 4.1 of the Code. The section provides that one absent from work for five or more days without permission or reasonable excuse is liable for dismissal.

Regarding the applicant's submission of the Ruwa Family Clinic's medical certificate the disciplinary committee found that it contained incorrect information given that she had not been attended to there during the period 13 to 26 December 2021. It was not persuaded by Dr Maforo's medical certificate because, historically having been allegedly issued first, it was only submitted after the Ruwa Family Clinic's certificate was queried raising obvious doubts about its authenticity.

The disciplinary committee reasoned that:

> "Your response on the reasons for your failure to submit the second certificate in the first place, did not convince the committee. Moreover, why on 13 December 2021 when you had a conversation with your supervisor you failed to update him that you had already visited Dr Maforo's surgery and had been issued with an off-duty certificate."

That way the applicant was also found guilty of any act of conduct or omission that amounts to a breach or repudiation of contractual obligations in breach of s 4.5.6 of the Code, she having submitted "a document with wrong information." The charge of uttering was dismissed. So was the applicant also dismissed from employment.

Aggrieved, the applicant appealed to the Appeals Authority without success. Thereafter she appealed to the court *a quo* which also dismissed the appeal. In doing so the court *a quo* proceeded from the premise that the applicant did not reasonably explain her absence from work because of the conflicting medical certificates leaving:

> "…the respondent at large to conclude that the applicant's absence had not been satisfactorily explained."

The applicant then sought leave of the court *a quo* to appeal to the Supreme Court which application was dismissed. On dismissing the application for leave to appeal the court *a quo* expressed the view that:

> "A reading of the grounds of the intended appeal shows that applicants (sic) seeks to impugn the findings of fact by the court *a quo* that there was nothing remiss of the disciplinary committee's conclusion that the employee was guilty since she favored the committee with conflicting medical certificates on the same issue thus casting aspersions on the authenticity of same"

Still unhappy, the applicant has made an application for leave to appeal before this Court.

THE APPLICATION

After the applicant's approach to the court *a quo* for leave to appeal to this Court was dismissed, the applicant timeously filed an application for leave to appeal in this Court under case number SC 403/23. The application was fatally defective and accordingly suffered the fate of such applications, being struck off the roll, on 17 August 2023 by MAVANGIRA JA.

Unrelenting, the applicant filed the present application on 24 August 2023 protesting that hers is a very important case seeking to resolve an employment dispute given that the constitution of the country "safeguards right to employment." The Supreme Court should be allowed to interrogate the question of whether she could lawfully be dismissed for being absent on days covered by valid medical certificates.

In the applicant's view her intended appeal enjoys very high prospects of success because the court *a quo* erred in upholding a finding that she had submitted false medical certificates when the disciplinary committee had dismissed the charge of uttering or attempting to utter fraudulent or false documents. The applicant rounded off by making the point that, not only does s 14 (2) of the

Labour Act [*Chapter 28:01*] guarantee her sick leave, at the material time there was in place the Public Health (Covid 19) Prevention, Containment and Treatment Regulations, SI 241/21 which affected her ability to report for work as she had Covid 19 related symptoms.

The application is opposed by the respondent mainly on the grounds that the intended appeal, to the extent that it seeks to impugn the factual findings of the lower courts, has no prospects of success at all. In the respondent's view the grounds of appeal do not advert to any gross misdirection as would entice the appellate court to interfere with those factual findings.

The respondent asserted that the applicant cannot possibly succeed on appeal when she has raised no point of law in seeking to assail the judgment of the court *a quo* as required by s 92F (1) of the Act. The respondent defended the findings of both the disciplinary committee and the court *a quo* on the facts that the applicant had not rendered a reasonable explanation for her failure to report for work between 13 and 29 December 2021.

THE LAW

The law is settled in this jurisdiction on what the court has regards to in considering an application for leave to appeal. Perhaps the starting point is to make reference to s 92 F (1) of the Act. It provides in peremptory terms that:

> "An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court".

An aggrieved party is, by clear legislative command, allowed to approach the Supreme Court on a question of law only and nothing else. It is accepted that a misdirection on the facts may reach such magnitude of grossness as to amount to a question of law. Whatever the case, a party seeking to rely on a gross misdirection amounting to an error of law, must lay that legal foundation

in the grounds of appeal. Such a party must invite the court, through appropriate averments, to relate to a question of law.

In addition, it is also settled that the role of the court or judge in an application for leave to appeal is that of a gate keeper to keep out meritless appeals while allowing in only those with merit. The court or judge does that in order to protect the appeal court from those chancers only bent on wasting the court's time with baseless appeals. Therefore, in order to succeed in an application for leave, the applicant must show reasonable prospects of success on appeal. The test for reasonable prospects of success has been stated in a number of cases. In explaining the term in *Essop v S* [2016] ZASCA 114 para 6, the Court observed:

> "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 categorized as hopeless. <u>There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal</u>" (My emphasis)

In our jurisdiction the courts have pronounced on prospects of success along the same lines. See *S v McGown* 1995 (2) ZLR 81 (S) where EBRAHIM JA discussed the various approaches recommended by the courts, compared our approach to that of the South African authorities and concluded at 83H- 84A:

> "In my view in whatever way one wishes to formulate the test, it comes to much the same thing. Clearly it would be appropriate to refuse an application that has little or no prospects of success or one that is frivolous. But where there is substance in the argument, there must *ipso facto* be a reasonable prospect of success."

Where a party attacks the factual findings of the lower courts on the basis of irrationality or gross misdirection or unreasonableness, the approach of our courts was stated in *Hama*

v National Railways of Zimbabwe 1996 (1) ZLR 664 (S) at 670 C-D, wherein the Court said:

> "The general rule of the law, on regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a concussion".

The above approach has been hallowed by repetition in this jurisdiction over the years. See for instance *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) 62F- 63A; *Zinwa v Mwoyounotsva* 2015 (1) ZLR 935 (S) at 940D – F; Chiodza *v Siziba* 2015 (1) ZLR 252 (S); *Shuro v Chiuraise* SC 20/19.

EXAMINATION

The applicant intents to impugn the judgement of the court *a quo* on five grounds of appeal. Ground one attacks the court *a quo's* failure to find the medical certificate of Dr Maforo valid. Ground two attacks the failure to find in favour of the applicant that the medical certificate issued by Ruwa Family Clinic was valid. Ground three attacks the finding that the applicant had no authority to absent herself from work during the relevant time.

Clearly all three grounds challenge factual findings without making the necessary averment that those findings are irrational, a gross misdirection or unreasonable. They therefore lay no foundation for interference by the appellate court.

Ground four is irrelevant, if not completely meaningless. It reads:

> "The court *a quo* misdirected itself at law when applying discretion on a matter expressly covered by s14 (sick leave) of Labour Act [C*hapter 28:01*] read with S.I. 241 of 2021 [Public Health (Covid 19) Prevention Containment and Treatment.]"

It is not clear what the applicant intends to argue. Whatever it is, it cannot detain the court at all because s 14 only provides, unless where more favourable conditions are provided for in

an employment contract or in any enactment, sick leave shall be granted in terms of that section. It also provides for 90 days paid sick leave in a year. It is spectacularly uneventful for present purposes.

The applicant absented herself from work without authority. When called upon to give an explanation for her absence she produced medical certificates full of confusion. They were rejected for that reason leaving her absence from work unexplained. The trial tribunal was entitled to make that factual finding. It has not been shown that the factual finding was irrational, neither has a gross misdirection been shown.

Ground five complains bitterly that the court *a quo* "re-established charges" of supplying false documents which were dismissed at trial. It is a ground that is the fruit of much confusion of thought and a serious misunderstanding of the facts. It matters not what one many say about the two medical certificates. Their relevance was to justify the applicant's absence from work from 13 to 29 December 2021. They were her own documents submitted to get her off the hook. They failed to achieve that purpose because they were unreliable for valid reasons meticulously set out by the Disciplinary Committee. The applicant does not show how that conclusion was irrational. It follows therefore that she also fails to show any misdirection on the part of the court *a quo* in upholding the finding of the Disciplinary Committee.

DISPOSITION

For very valid reasons set out in its sound judgement, the Disciplinary Committee found the applicant guilty of the misconduct of absenteeism. It also found her guilty of conduct amounting to a breach or repudiation of contractual obligations. In accordance with the Code of Conduct it dismissed the applicant from employment.

The court *a quo* cannot be faulted for upholding these findings and refusing to

interfere.

While the applicant is allowed to appeal to this Court on a point of law only, she has failed to show that her intended appeal satisfies the provisions of s 92F (1) of the Labour Act. More importantly, the applicant has not laid out any legal foundation for contesting the factual findings made by the lower courts.

I am left with no doubt whatsoever that the application dismally fails to demonstrate any reasonable prospects of the success of the intended appeal. It follows that the application, being devoid of merit, must fail. There is no reason why the costs should not follow the cause.

In the result, it be and is hereby ordered that the application is dismissed with costs.

Gill Godlonton &Gerrans, respondent's legal practitioners.