DISTRIBUTABLE (35)

HURUNGWE RURAL DISTRICT COUNCIL
v
(1) JORAM MISHECK MOYO (2) KAROL MUTENGA (3) JACKSON MASHINGE

SUPREME COURT OF ZIMBABWE
MATHONSI JA
HARARE, 17 MARCH 2021 & 04 MAY 2021

IN CHAMBERS

B. Magogo, for the applicant

G. Madzoka with *M. P. Dube*, for the respondents

MATHONSI JA:

This is a chamber application for leave to appeal against the judgment of the Labour Court handed down on 28 February 2020. The application is made in terms of s 92F(3) of the Labour Act [*Chapter 28:01*] ("the Act"), the Labour Court having refused the applicant leave to appeal on 20 November 2020. After hearing arguments from counsel, I reserved judgment.

FACTS

The brief facts relevant to the determination of this application may be summarized as follows. The respondents were employed by the applicant in various managerial capacities with the first respondent being the Chief Executive Officer of the applicant. Sometime in 2018, allegations of misconduct were levelled against them leading to disciplinary proceedings being instituted against them. The disciplinary action was prompted by investigations carried out by

the Ministry of Local Government, Public Works, and National Housing on the applicant. The investigations culminated in the production of a damning report implicating the respondents in abuse of office.

The applicant found itself in a quandary as to the use of its registered code of conduct in disciplining the respondents in that, as senior managers, they constituted the Disciplinary Committee in terms of the internal code. Apart from that, the National Employment Council for the industry registered its own code, namely SI 87/17. In terms of s 101(1b) of the Act, it became necessary for the applicant's internal code to be submitted to the National Employment Council for approval before it could be applied.

As a result, the applicant resorted to the use of the Labour (National Employment Code of Conduct) Regulations, Statutory Instrument 15/2006 (the Model Code) to discipline the respondents. The respondents were subsequently suspended on 24 July 2019, charged and a disciplinary committee found them guilty and recommended that they be dismissed from employment in terms of the Model Code. They received their letters of dismissal on 19 and 20 August 2019.

They were aggrieved and made an application to the Labour Court for review of the disciplinary committee's decision. The basis of their application was that they were charged under the wrong code, the Model Code. They argued that they ought to have been charged in terms of the applicant's internal code of conduct, notwithstanding the conundrum posed by the application of that code as stated above.

The Labour Court found in favour of the respondents. It reasoned that the respondents were not suspended in terms of the applicant's internal Code of Conduct which was registered and had been used in previous disciplinary hearings. It found that their suspension was premised on criminal proceedings at Chinhoyi Magistrates Court of which they had been acquitted, that the charges did not come from the applicant's Code of Conduct and the Disciplinary Authority was not appointed in terms of that Code of Conduct. As a result, it was not clothed with legality to try the respondents.

Being aggrieved by the court *a quo*'s judgment on review, the applicant applied, in terms of s 92F(2), for leave to appeal to the Supreme Court. The application was dismissed. It is the refusal by the Labour Court to grant the applicant leave to appeal which has led to this application. The crux of the application is that the respondents were properly dismissed under the applicable code. According to the applicant, it could not have used its internal code of conduct to discipline the respondents because the same had not been submitted to the National Employment Council for approval in terms of s 101(1) of the Act.

The respondents opposed the application insisting that the applicant had used the wrong code to dismiss them hence there were no prospects of success on appeal.

SUBMISSIONS BY COUNSEL

Mr *Madzoka* for the respondents initially raised a preliminary point that the record of proceedings in the Labour Court was not attached to the application when it ought to have been attached before the matter could be heard. Counsel however abandoned that point and conceded that the matter could be determined in the absence of the record. He acknowledged

that the only issue to be considered was which code was applicable to the respondents in the circumstances of this case.

On the merits, Mr *Magogo* for the applicant submitted that since the respondents constituted the permanent members of the employer's representatives in the Disciplinary Committee, they could not preside over their own disciplinary proceedings. He asserted that as the applicant's internal code was silent on the constitution of the Disciplinary Committee for disciplinary proceedings against the respondents, there was an absence of a registered internal code justifying the use of the Model Code. Reliance was placed on s 12B(3) of the Act and s 5 of S.I 15/05.

Mr *Magogo* further submitted that the second predicament which the applicant found itself in is that the internal Code had not been submitted to the National Employment Council for approval as required in terms of s 101(1b) of the Act. As a result, the applicant could not have used the internal code. The use of the Model Code, so it was argued, was proper as there was an absence of a registered code applicable to the respondents.

Mr *Madzoka* did not dispute that the applicant had not submitted its internal code of conduct to the NEC for approval in terms of s 101(1) of the Act. That concession could not stop counsel from contending that the NEC code did not supersede the applicant's internal code. In his view, the applicant ought to still have used the internal code to discipline the respondents. He argued that the purpose of s 101(1) was to avoid a conflict between the internal code and the NEC code. In that light, it was his submission that there was no conflict between the two. As such, the internal code ought to have been used as it was not necessary to seek NEC approval before deploying the internal code against the respondents.

THE PURPOSE OF AN APPLICATION FOR LEAVE

In *Ngambizi v Murowa Diamonds (Pvt) Ltd* 2013 (1) ZLR 569 (S) at 572 G, when dealing with the purpose of an application for leave to appeal in terms of s 92F(2) of the Act, the court made the following apposite remarks:

> "It is important to relate the requirement for an application for leave to appeal to the purposes thereof. These are for the decision to be made on the questions whether the grounds of appeal relate to questions of law and the existence of prospects of success on appeal."

In light of that, two issues arise for determination namely whether the intended notice of appeal raises questions of law and whether the proposed appeal has reasonable prospects of success. I address the two in turn below.

Whether the intended notice of appeal raises questions of law

In terms of s 92F(1) of the Act, an appeal from the decision of the Labour Court must be on a question or point of law only. What constitutes a point of law was stated in *Sable Chemical Industries Limited v Easterbrook* 2010 (2) ZLR 342 (S) at 346 B-D where this Court remarked as follows:

> "The term 'question of law' is used in three distinct though related senses. First, it means 'a question which the law itself has authoritatively answered to the exclusion of the right of the Court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter'. Second, it means 'a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter'. And third, 'any question which is within the province of the Judge instead of the jury is called a question of law'– see *Muzuva v United Bottlers (Pvt) Ltd* 1994(1) ZLR 217(S), 220 (D-F).
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> The position is also settled that a serious misdirection on the facts amounts to a misdirection in law as the giving of reasons that are bad in law constitutes a failure to hear and determine according to law."

See *Zvokusekwa v Bikita Rural District Council* SC 44/15,

A reading of the applicant's Notice of Appeal shows that the applicant intends to raise 4 grounds of appeal. The gravamen of the intended appeal is that the Labour Court erred in determining that the disciplinary committee that decided on the dismissal of the respondents lacked the requisite jurisdiction to preside over the disciplinary proceedings. What is central to the applicant's intended challenge on appeal is the propriety of the Labour Court's finding that the internal code and not the Model Code, was applicable. Clearly, that is a question of law and nothing else. Consequently, the applicant has satisfied the first requirement of the application for leave to appeal.

Whether the intended appeal has reasonable prospects of success.

The next issue for consideration is whether, on the issue raised, the applicant has reasonable prospects of success on appeal. In *Prosecutor General v Intratek & Ors* SC 59/19, PATEL JA (as he then was) highlighted at p13 of the cyclostyled judgment that;

> "As for the requirement of leave to appeal to be obtained before the right to appeal can be exercised, this Court is vested with an essentially gatekeeping function, viz. to allow only cases that deserve to be heard on appeal to pass muster. What this entails is an evaluation of the grounds of appeal to be relied upon and their prospects of success at the intended appeal. See *Chikurunhe & Ors v Zimbabwe Financial Holdings* SC 10-08; *Chipangura v Environmental Management Authority* SC 35-12."

The sole issue for determination on the applicant's prospects of success is whether or not the Labour Court properly found that the applicant's internal code was applicable to the respondents' disciplinary proceedings.

The applicant's code of conduct was silent on the procedure to be taken in disciplinary proceedings against senior management personnel like the respondents. The respondents were also the ones who presided over disciplinary proceedings against low-level employees. It follows therefore that they could not have presided over their own disciplinary

proceedings. It is for this reason that Mr *Magogo* may have a point that, with the internal code being silent on disciplinary proceedings against the respondents, it may not have been applicable in the circumstances. The provisions of s 12B(2) of the Act may have been triggered if there was an absence of a registered code applicable to the respondents' case.

The provisions of s 12B(2) (a) mandate the use of the Model Code where an internal code is not available or where the existing code cannot be used. The mere existence of a registered code of conduct is not sufficient to oust resort to the Model Code. There must be in existence a registered code of conduct applicable to the case in question and where there is a registered code that is inapplicable to the circumstances of the case, there is an absence of an employment code for the purposes of s 12B(2) of the Act.

In addition, it is common cause that the applicant's internal code had not been submitted to the Employment Council for approval as mandated by the provisions of s 101(1) of the Act. There is therefore a case for the Supreme Court to pronounce itself on, namely whether the internal code was not superseded by the NEC code for purposes of the respondents.

In that regard, I can do no better than reproduce s 101(1) of the Act which reads;

"**101 Employment codes of conduct**

(1) An employment council or, subject to subsections (1a), (1b) and (1c), a works council may apply in the manner prescribed to the Registrar to register an employment code of conduct that shall be binding in respect of the industry, undertaking or workplace to which it relates.
(1a) Where an employment council has registered a code governing employers and employees represented by it, no works council may apply for the registration of a code in respect of any industry, undertaking, or workplace represented by the employment council unless it first refers the code to the employment council for its approval.
(1b) Where a code is registered by a works council in respect of any industry, undertaking, or workplace represented by an employment council and the employment council subsequently registers its own code, **the code registered by**

> **the employment council shall supersede that of the works council unless the works council refers it to the employment council for approval." (**my emphasis)

As l have said, it is for the Supreme Court to make a pronouncement on whether the internal code could be applied in the circumstances of this case. If indeed it was superseded by the National Employment Council code and approval had not been sought and obtained, then the applicant's appeal has prospects of success. Put differently, the applicant has an arguable case on appeal.

DISPOSITION

Accordingly, there is merit in the application for leave to appeal. The applicant has made a good case for the relief sought.

In the result, it be and is hereby ordered as follows;

1. Leave to note an appeal against the judgment of the Labour Court delivered on 28 February 2020 be and is hereby granted.
2. The applicant shall file its notice of appeal within 10 days of the date of this order.
3. The costs of this application shall be costs in the appeal.

Mawire J.T. & Associates, applicant's legal practitioners

J. Mambara & Associates, respondents' legal practitioners