REPORTABLE (63)

Judgment No. SC 78/06
Civil Appeal No. 45/06

(1) ZIMBABWE NEWSPAPERS (1980) LIMITED WORKERS COMMITTEE
(2) ZIMBABWE NEWSPAPERS (1980) LIMITED EMPLOYEES
(3) SAMUEL KABASA v

(1) HONOURABLE MUSARIRI (Presiding President in his official capacity)
(2) THE LABOUR COURT
(3) ZIMBABWE NEWSPAPERS (1980) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & MALABA JA
HARARE, JULY 10, 2006 & MAY 17, 2007

S Hwacha, for the appellants

No appearance for the first and second respondents

J C Muzangaza, for the third respondent

CHIDYAUSIKU CJ: This is an appeal against the judgment of GOWORA J dismissing an application for the review of proceedings of the Labour Court. The application for review was dismissed on the ground that no record of the proceedings was available or before the Judge.

The appellants were dissatisfied with that decision and now appeal to this Court on the grounds set out in the Notice of Appeal, which reads in part as follows:

"1. Having first noted correctly that the matter before it was both 'for a declaratory order' and **separately** for 'a review' the court *a quo* erred and misdirected itself in arriving (at) a decision only on the review and overlooking the *declaratur*.

2. The court *a quo* erred in law and or misdirected itself in the finding that the *declaratur* sought in paragraph 3 of the draft order that 'the summary dismissal of the applicants be and is hereby declared null and void or set aside' was not justifiable in the circumstances.

3. The court *a quo* erred in having not found that -

   3.1 The summary dismissal of the applicants by Zimbabwe Newspapers (1980) Limited without compliance with the Code of Conduct was void and or liable to be set aside.

   3.2 The summary dismissal of the applicants was in contravention and in contempt of the Labour Court's disposal order (and?) was void or liable to be set aside.

4. In any event, the court *a quo* erred and or was misdirected in dismissing the entire application on the grounds that there was no record of proceedings and no reasons, whilst acknowledging that the applicants had sought a review of the Labour Court's decision for these very same complaints against the Labour Court.

5. More so, the court *a quo* dismissed the application on those stated grounds without giving either counsel an opportunity to address the court on the issue and or to present available evidence that the applicants had actually asked the Labour Court to provide 'the record'. The parties were not asked to address the court over (on?) the very point on which the application was dismissed.

6. The court *a quo* erred and or misdirected itself, in any event, in considering the matter on the basis that the **only** issue before it was whether or not the decision of the Labour Court was grossly unreasonable and overlooking issues including whether or not the dismissals stood good in law.

7. In all the circumstances, the decision of the High Court *a quo* was in the circumstances grossly unreasonable and irrational.

8. The court *a quo* erred in ordering that the applicants should pay the costs of suit.

PRAYER

1. The appellants pray for an order setting aside the judgment of the High Court and its substitution with an order that the dismissal of the applicants be declared null and void or set aside, their reinstatement from the date of suspension without loss of pay and benefits and costs of suit before this Honourable Court, the Labour Court and the High Court."

The facts forming the background to the case are essentially common cause and they are briefly as follows –

The appellants were employees of the third respondent (hereinafter referred to as "the respondent"). On 16 July 2004 the appellants notified the respondent of their intention to embark on a collective job action. On 2 August 2004 the collective job action or the strike commenced. The respondent applied to the Minister of Public Service, Labour and Social Welfare ("the Minister") for a show cause order in terms of s 106 of the Labour Act [*Cap. 28:01*] ("the Act"). An enquiry into the dispute was instituted by a labour officer, who made recommendations to the Minister. The then Acting Minister issued a show cause order in terms of which immediate cessation of the collective job action was directed.

The appellants appealed to the Labour Court against the issuance of the show cause order. However, they did not cease the collective job action as was required by the show cause order. In this regard, s 110(2) of the Act provides as follows:

"(2) The lodging of an appeal in terms of subsection (1) shall not affect any order appealed against:

Provided that pending the determination of the appeal, the Minister may give such directions to, or impose such restrictions on, any of the parties as he

> considers fair and reasonable, taking into account the respective rights of the parties and the public interest."

The Minister did not exercise any of his powers in terms of the proviso. Thus, the noting of the appeal against the show cause order did not suspend the operation of the show cause order. Consequently, the continued collective job action by the appellants was unlawful.

On 12 August 2004 the appeal against the show cause order was heard and judgment was reserved. The collective job action continued unabated. On 18 August 2004 judgment was handed down dismissing the appeal against the show cause order.

Following the dismissal of the appeal and the continued collective job action, the respondent summarily dismissed the appellants for, among other things, engaging in an unlawful collective job action, continuing with such collective job action despite a show cause order terminating it, and engaging in riotous behaviour.

On 25 August 2004 the appellants filed an urgent application to the Labour Court for reinstatement. The urgent application was heard by two Presidents of the Labour Court in Chambers on 31 August 2004 and was dismissed.

On 19 October 2004 the appellants filed an application to the High Court for the review of the Labour Court's proceedings and for a *declaratur*. This application was opposed and the matter was set down for argument on 29 June 2005. On that date

the matter was postponed *sine die*. It was alleged by the respondent that the court *a quo* pointed out that the papers were not in order, presumably by reason of the non-availability of the record, and the appellants were ordered to pay costs. This is not on the record, but appears from the respondent's Heads of Argument and was not disputed by the appellants. Argument was then heard on 14 September 2005 and judgment reserved. The application for review was dismissed.

In the application for review, the appellants sought the following relief from the court *a quo*:

"**IT IS HEREBY ORDERED AND DECLARED THAT:**

1. The dismissal of the applicant and the applicant's members summarily without complying with the terms of paragraph 3 of the disposal order handed down on the 20th of August 2004 is in breach and contempt of the disposal order.

2. The dismissal of the applicants be and is hereby set aside. The applicants are to be paid all salary and benefits due to them unless they are lawfully dismissed.

3. Should the respondent (Zimpapers 1980) Limited wish to pursue any disciplinary cases against the applicants, it is ordered and directed that disciplinary proceedings be convened in respect of each employee strictly in terms of the Code of Conduct. If the Code of Conduct is inapplicable or inappropriate for any reason whatsoever, the respondent is ordered to conduct disciplinary hearings through any other lawful procedure available to it.

4. The disposal order issued by this Honourable Court on the 20th of August 2004 is hereby varied and or clarified to the extent above.

5. The respondent is ordered to pay the costs of this urgent application."

The judgment reveals that Mr *Hwacha*, who represented the appellants in the court *a quo*, abandoned the relief sought in paras 1-2 of the draft order. The learned Judge took the view that it remained for the court to deal with the application for relief sought in the last three paragraphs of the draft order. In this regard she had this to say at pp 3-4 of the cyclostyled judgment:

> "When one has regard to the relief sought by the applicants in the paragraphs remaining it is clear that this court is being requested to review a decision of the Labour Court. The applicants have filed as part of their papers the application they made to the Labour Court to have the summary dismissals set aside. The respondent in that matter, being the employer, also filed papers in opposition of the application. A perusal of the opposing affidavit filed by the respondent in this matter leads me to conclude that the presiding presidents raised or dealt with preliminary issues with the urgent application that was before them. The application was then according to the respondent dismissed on the basis of the preliminary points. The merits of the matter were not debated before the court. Neither the record of the hearing of that application nor the order issued by the court are before me. The Labour Court did not issue a judgment and would appear to have just issued an order. Order 33 Rule 260 requires that the clerk of the inferior court whose proceedings are being brought on review lodge with the registrar of this court the original record of the proceedings being reviewed. This is to be done within twelve days of the date of service of the application upon the inferior court. The applicants are legally represented and the need to have the record of proceedings in the inferior court placed before this court must have been obvious.
>
> The papers filed by the applicants state that the Labour Court did not give reasons for its decision to dismiss the urgent application. The papers also confirm that the matter was heard in chambers. This, however, is not proof that a record of the proceedings does not exist. Although in terms of the High Court Rules the duty to file the record is with the clerk of the inferior court, it was, in my view, incumbent upon the applicants to ensure that the record, such as it was, was placed in the record for this application. There is nothing on the record to show that the applicant(s) even sought that the record be availed to this court. When they appeared before me neither counsel remarked on the absence of the record. Even the order in terms of which the application was dismissed by the Labour Court was not placed before me."

The learned Judge then concluded:

> "In my view, the absence of the record and the reasons by the lower court as to how it arrived at its decision preclude me from making any conclusion as to the rationality or otherwise of the decision.
>
> In the premises the application for a review fails and it is dismissed. The applicant(s) (are) ordered to pay the costs of this application."

Thus the learned Judge dismissed the application for review on the grounds that she was not able to review the proceedings without the record of the proceedings.

There is no doubt that a record of the proceedings under review is an essential part of the record required by the High Court. Rule 260(1) of the High Court of Zimbabwe Rules 1971 ("the Rules") provides:

> "**260 Preparation and lodging of record and fees**
>
> (1) The clerk of the inferior court whose proceedings are being brought on review, or the tribunal, board or officer whose proceedings are being brought on review, shall, within twelve days of the date of service of the application for review, lodge with the registrar the original record, together with two typed copies, which copies shall be certified as true and correct copies. The parties to the review requiring copies of the record for their own use shall obtain them from the official who prepared the record."

The obligation to prepare the record is placed fairly and squarely on the registrar of the inferior court whose proceedings are under review. In this case the registrar of the Labour Court had an obligation to make the record available. It is common cause that h*e/*she did not prepare the record or make it available. The remedy available to an applicant for review who finds himself or herself in a situation where the record is not available is to apply for a *mandamus* compelling the registrar of the inferior

court to prepare the record. This should be done prior to the hearing of the substantial application for review on the merits. In this case the appellants did not do that. They instead applied for set down and argued the matter on the merits.

Faced with that situation, the court *a quo* had the discretion to postpone the matter pending the provision of the record, dismiss the application or order any other relief. The court *a quo* has a discretion as to which course to follow. Where the court *a quo* in the exercise of its discretion dismisses the application as opposed to postponing the matter or granting any other relief, this Court will not interfere with the exercise of such a discretion unless the exercise of the discretion was grossly unreasonable.

In casu, the matter had been previously postponed and the issue of the absence of a record of the proceedings in the Labour Court was brought to the attention of the appellants. When the application was set down for hearing it was incumbent upon counsel to explain why the matter had been set down despite the absence of the record or lack of compliance with r 260(1) of the Rules. According to the judgment, neither counsel addressed the learned Judge on this issue.

While obviously it might have been preferable to postpone the matter in order to enable the registrar of the Labour Court to place before the court *a quo* a record of the proceedings under review, dismissal of the application was not grossly unreasonable. This is particularly so as this issue had been highlighted when the matter was previously postponed. The appellants should have sought an order compelling the

registrar of the Labour Court to provide a record before seeking to argue the case on the merits.

Accordingly, the first ground of appeal cannot succeed.

It was also contended by the appellants that in paras 4 and 5 of the draft order in the court *a quo* the appellants were seeking a *declaratur*.

I am not persuaded by this argument. A careful reading of the draft order reveals that paras 1 and 2 of the draft order sought a *declaratur*. I see nothing in the wording of paras 3 - 5 that suggests that a *declaratur* was being sought. The court *a quo*, quite rightly in my view, proceeded on the basis that that paras 1 and 2 sought a *declaratur*, while paras 3 and 4 of the draft order related to the review. Accordingly, I am satisfied that there was no misdirection in this regard.

The appellants have also sought, as is apparent from the relief in the Notice of Appeal, an order from this Court declaring the dismissal of the appellants unlawful.

The record as it stands reveals that the appellants embarked on a collective job action. The collective job action was initially lawful as due notice of the strike had been given. The respondent applied for and was granted a show cause order in terms of which cessation of the strike action was ordered and thus rendered the continued

collective job action unlawful. The Labour Court also ruled that that collective job action was unlawful but despite that the appellants continued with the collective job action.

In this Court the appellants did not contend that such collective job action after the issuance of the above orders was lawful. The appellants' main contention, as I understand it, was that there should have been an enquiry to establish whether or not the appellants should be dismissed. There is no suggestion that the appellants did not take part in the collective job action that became unlawful following the show cause order. It is not clear on the papers as they stand what it is that the enquiry would have sought to resolve.

Initiating an enquiry for the sake of an enquiry is an absurdity. There has to be a dispute before an enquiry is called for. The appellants were dismissed for participating in an unlawful collective job action. The Labour Court, after hearing submissions from both parties, held that the collective job action was unlawful. On the papers as they stand, the appellants do not dispute that they participated in an unlawful collective job action. The respondent dismissed the appellants for participating in an unlawful collective job action. What then is an enquiry intended to determine?

Accordingly, I am satisfied that no case has been made for the issuance of the *declaratur* sought by the appellants.

Finally, my understanding of the judgment of the High Court is that it did not go to the merits of the matter. The application for review was dismissed for non-compliance with the Rules of the court, in particular the failure to provide a record of the proceedings of the Labour Court. Should the appellants be so minded, it is open to them to resubmit the application for review to the High Court. I am not in any way suggesting that the appellants are absolved from complying with other requirements of the Rules relating to the time within which an application for review has to be launched. That matter is entirely within the purview of the High Court, to condone or not to condone an application submitted out of time.

Accordingly, the appeal is dismissed with costs.

CHEDA JA: I agree

MALABA JA: I agree

Dube, Manikai & Hwacha, appellants' legal practitioners

Muzangaza, Mandaza & Tomana, third respondent's legal practitioners