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FADZAI JOHN
v
DELTA BEVERAGES LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 14, 2017 (Released on 6 June 2017)

T Marume with *T Mafongoya*, for the applicant
Z Chadambuka, for the respondent

Before **GUVAVA JA,** in chambers in terms of r 5 of the Rules of the Supreme Court, 1964.

This is a chamber application for leave to appeal against the decision of the Labour Court in terms of s 92 F of the Labour Act [*Chapter 28:01*]. After hearing arguments from both parties on the preliminary points raised I dismissed the application with costs.

The applicant has requested written reasons for the decision. These are they.

The brief facts of the matter may be summarized as follows. The applicant was employed by the respondent as a sales representative. The respondent alleged that on 20 September 2010, the applicant requested and was given 40 cases of soft drink cans in order to replace a bad

batch which had been delivered to Food World, a shop based along Cameron Street. The respondent further alleged that the 40 cases were never delivered to Food World.

Based on these allegations, the applicant was charged with theft under s 1(1) of the Respondent's Code of Conduct. Following a disciplinary hearing the applicant was found guilty of theft and dismissed from employment.

The main evidence against the applicant was a document which was allegedly signed by an employee from Food World acknowledging receipt of 21 cases instead of 40. During the disciplinary hearing the Food World employee, who had signed for the 21 cases, was made to sign five times to check his signature against that on the delivery note in question. The members of the Disciplinary Committee came to the conclusion that the signatures did not match and consequently that the drinks were never delivered. Based on that conclusion the applicant was found guilty of theft. The applicant was aggrieved by the decision and appealed to the Labour Court.

On appeal to the Labour Court, the disputed signatures were sent to a handwriting expert. The expert confirmed the finding before the disciplinary committee that the signatures which had been taken during the hearing did not match the signature of the witness. The appeal was thus dismissed. The applicant applied for leave to appeal to the Supreme Court which leave was denied. The applicant then filed the present application.

The respondent opposed the application and in its notice of opposition raised six preliminary points. It was argued on behalf of the respondent firstly, that the application was

fatally defective as it did not contain a record of the proceedings before the Labour Court. Secondly, the application did not contain a prayer for the relief sought by the applicant. Thirdly, the application did not conform with the form for such applications as there was no document setting out the grounds supporting the granting of leave. Fourthly, the application did not contain grounds that can support the relief sought. Fifthly, the application did not state the date when the Labour Court refused to grant the applicant leave to appeal as required by the rules. Sixthly, the affidavit filed in support of the application was defective and, lastly, the applicant had cited a non-existent respondent.

At the hearing the respondent submitted that the application should be dismissed due to the following points:

1. **Defective Relief Sought**

The applicants' prayer in the draft Notice of Appeal was defective as it was incomplete. The relief sought was drafted as follows:

> "Wherefore the appellant prays that the appeal be allowed with costs and the decision of the court *a quo* to be set aside and it be substituted as follows:
>
> 1. The appellant be and is hereby reinstated with full benefits and back pay with effect from the date of unlawful dismissal.
> 2. In the event that the reinstatement is no longer possible, either party is entitled to approach the court for quantification of damages and back pays"

It has been emphasized in several judgments of this court that the rules require that that prayer in the notice of appeal must exact in nature. This matter came to the Labour Court as an appeal from a determination of the disciplinary committee. This application is to appeal against the decision of the Labour Court. In seeking the setting aside of the decision of the court *a quo,*

the applicant neglected to address what should happen to the decision of the disciplinary hearing. In *casu,* for the avoidance of doubt the prayer ought to have read as follows:

> "Appellant prays that the appeal be allowed with costs and the decision of the court *a quo* to be set aside and substituted as follows:
>
> 1. Appeal be and is hereby allowed ….
> 2. The decision of the Workers council is set aside
> 3. The appellant be and is hereby reinstated…"

In the case of *Ndlovu & Anor v Ndlovu & Anor*[1] MALABA JA, as he was then, held that:

> "The exact nature of the relief sought was not stated. What was prayed for in the notice of appeal was that the judgment of the court *a quo* be dismissed with costs. It is the appeal which is dismissed or allowed. If the appeal is allowed the judgment or decision appealed against is then set aside and a new order substituted in its place. In this case it was not known what order the appellants wanted this Court to make in the event the appeal succeeded." (My emphasis)

In this case the applicant not only failed to pray for the success of the instant appeal but also failed to highlight what order he seeks to substitute in the event that the appeal is allowed. In the case of *Chamboko v Dorowa Minerals Limited* SC 26/15 this court stated as follows:

> "In any case an applicant for leave to appeal must file a notice of appeal that conforms to the requirements of the rules of court at the time the application for leave to appeal is made. Where the notice of appeal filed is fatally defective, there is no valid application."

2. Failure to cite the correct respondent

The respondent highlighted that it has been cited as "Delta Beverages Limited" as opposed to Delta Beverages (Private) Limited. Applicant concedes this point in his answering papers.

[1] SC133/02

In *Gariya Safaris (Pvt) Ltd v van Wyk*[2] it was stated as follows:

> "A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void *ab initio."*

In this case the applicant cited a non-existent respondent. Thus in the same vein the application was a nullity.

3. <u>Failure to attach the record of the court *a quo*</u>

Counsel for the respondent contended that the failure by the applicant to attach the record of the court *a quo* to the present application was fatal. Although this is not a requirement in terms of the Supreme Court (Miscellaneous Appeals and References) Rules, 1975 as the matter is an appeal from the Labour Court; in this case the court in dealing with the matter in a previous application had directed that the record of proceedings should form part of the record. In spite of such direction the applicant failed to do so. This was fatal to the application, see *Masenga v Guthrie* 2002 (2) ZLR 321 at 327

Although it is generally accepted that dismissing matters on technicalities is not desirable the defects in the present application were of such a nature that they went to the root of the application. Where the court is presented with a defective application the applicant must seek the indulgence of the court in order for the irregularities to be condoned. It has been stated in numerous decisions of this court that legal practitioners are officers of the court charged with exercising due care in the execution of their roles. The court is inundated with pleas of mercy where legal practitioners have not carried out their work with due diligence.

[2] 1996 (2) ZLR 246 (H)

There comes a time when the court, in the exercise of its discretion, must decide that that there is a limit to which such indulgences can be granted to an applicant and such applications will be dismissed where they fail to comply with the rules of the court. Striking the matter off from the roll does not finalize the matter but merely means the matter will be filed again thus clogging the court system with recycled cases. In my view there is a limit to which the court will indulge a litigant, as there must be finality in litigation. This is so especially in circumstances where a matter has been brought before the court previously and an indulgence granted by the court and an interim order given, as in this case, directing that certain things be done yet the matter is filed again without complying with the courts direction. In this particular case the parties had specifically agreed that this application would be placed before me to ensure that what had been agreed to would be done. Despite that under-taking the application was filed without doing what had been agreed to and directed by the court.

In most cases, the courts refrain from visiting the errors of a practitioner on the client however as McNALLY JA stated in the case of *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290 C-E:

> "It is a policy of the law that there should be finality to litigation. On the other hand one does not want to do injustice to litigation but it must be observed that in recent years applications for condonation; for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for mercy than justice. Incompetence has become a growth industry... The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt*, roughly translated; the law will help the vigilant but not the sluggard." (Own emphasis)

Vigilance applies not only with respect to time taken to file process but incorporates careful observation, due care, prudence, attention to detail and a conscientiousness that exemplifies diligence on practitioners' part in drafting documents for a litigant and obeying court orders.

All these factors were lacking in this application. It was for the above reasons that I upheld the points *in limine* and dismissed the application with costs.

Matsikidze & Mucheche, applicant's legal practitioners

Dube Manikai & Hwacha, respondent's legal practitioners