UNIVERSITY OF ZIMBABWE
v
(1) KWANELE N. JIRIRA (2) LOUIS MASUKO

SUPREME COURT OF ZIMBABWE
BHUNU JA
HARARE, 15 JUNE 2016

R. H. Goba, for the applicant

K. E. Kadzere, for the respondents

IN CHAMBERS

BHUNU JA: This is a chamber application for leave to appeal against the judgment of the Labour Court in terms of r 5 (2) of the Supreme Court (Miscellaneous Appeals and References) Rules, 1975.

The applicant is a tertiary educational institution incorporated as such under the University of Zimbabwe Act [*Chapter 25:16*]. Both respondents are its former workers who were employed as research fellows at its Institute of Development Studies. They were dismissed from employment by the disciplinary Tribunal on allegations of misconduct. They are alleged to have wilfully refused to obey a lawful order to be redeployed from the Institute of Development Studies offices to the University campus.

Aggrieved by their dismissal from employment they approached the Labour officer complaining of unfair dismissal. The Labour Officer in turn referred their grievance for arbitration. The arbitrator ruled in their favour and made an award of reinstatement and in the alternative damages in *lieu* of reinstatement.

Dissatisfied with the Arbitration award, the applicant appealed to the Labour Court without success. Unhappy with the decision of the Labour court, the applicant sought leave to appeal to this court. On 5 April 2013 the Labour Court granted the applicant leave to appeal to this Court.

The applicant did not however reinstate the respondent as ordered by both the Arbitrator and the Labour Court. As the result the respondents approached the Arbitrator for quantification of damages in *lieu* of reinstatement. The Arbitrator assessed damages in the amounts of US$156 852.13 and US$134 362. 00, respectively.

Aggrieved by the quantification award, the applicant once again appealed against that award to the Labour Court. Despite the appeal, the respondents proceeded to register the award with the High Court for enforcement. A writ of execution and attachment of the applicant's property was subsequently issued. The applicant made an urgent application for stay of execution without success. It then successfully appealed to this court for stay of execution pending appeal under judgment number SC 6/12.

The applicant's appeal against the quantification award was subsequently dismissed by the Labour Court. Its complaint is that CHIVIZHE J granted the application for dismissal of the appeal without a formal hearing of the appeal. They allege that despite

numerous requests the honourable judge failed to provide the applicant with reasons for judgment resulting in the lapse of time stipulated of the intended appeal.

It therefore became necessary to apply for condonation and extension of time to file an application for leave to apply to this Court. Both parties filed heads of argument. The applicant now alleges that while they were waiting for the set down date of hearing they were surprised to receive a written judgment by HOVE J dismissing the application for leave to appeal to this Court. It is not clear to me but it appears that the matter was subsequently placed before the same judge who then properly heard the application and dismissed the applicant's claim under judgment LCH/H/472/2011 at page 56 of the record of proceedings. It is this judgment which prompted this application.

In terms s 92F (3) of the Labour Act [*Chapter 28:01*], where a judge of the Labour Court refuses to grant leave to appeal, the applicant may seek leave from a judge of this Court. When a judge of the Supreme Court sits in chambers to decide the application for leave to appeal he does not treat the application as an appeal against the refusal to grant leave by the court *a quo*. He simply decides the matter on the merits as if it was a fresh application before him/her. For that reason while he may consider the criticisms levelled against the judge in the court *a quo*, these are not overriding considerations because he makes his own independent fresh determination on the basis of the papers and arguments placed before him/her.

I now turn to consider the application for leave to appeal to this Court on the merits.

An application for leave to appeal to this Court is firmly grounded on the applicant's prospects of success on appeal. In terms of s 92F of the Act, appeals from the

Labour Court only lie to this Court on a point of law. In that regard the first question for consideration is whether the applicant's grounds of appeal raise a point of law.

The grounds of appeal essentially raises the question whether the applicant was subjected to a fair trial when CHIVIZHE J issued an order under case number LC/H/145/11 without giving reasons for the order which it has branded a judgment.

The order is dated 31 October 2012 and it reads:

"IN THE LABOUR COURT OF ZIMBABWE

LC/H/145/11

In the matter between:-

KWANELE JIRIRA & ANOTHER **Applicants**

Vs

UNIVERSITY OF ZIMBABWE **Respondents**

Before the Honourable B T Chivizhe, President

(IN CHAMBERS)

Whereupon after reading documents filed of record

IT IS ORDERED THAT

The application for dismissal of appeal in terms of Rule 19 (3) (a) of the Labour Court Rules be and is hereby granted."

The above order is clearly not a judgment but an order given by the learned judge *a quo* sitting in chambers. This is so because it does not bear a judgment number or reasons for judgment. It cites no legal representatives signifying that none were heard although both parties had legal representation. This is clearly a default judgment. It is not correct for the applicant to say in its founding affidavit that the learned judge did not give reasons for its judgment. This

is because in the same breath it confesses that the judgment was given pursuant to an application for dismissal of its appeal because of its failure to file heads of argument timeously.

It is therefore plain that the applicant's appeal was dismissed for want of compliance with the Rules. Nowhere in its grounds of appeal does the applicant allege that it filed its heads of argument timeously.

In my view, the applicant having failed to file its heads of argument within the prescribed time limit, it ought to have applied for rescission of judgment in terms of s 92C. The section confers a wide discretion on a judge of the labour Court to rescind his own decisions including those given in the absence of a party or in error. The section provides as follows:

> "(1) Subject to this section, the Labour Court may, on application, rescind or vary any determination or order—
> *(a)* which it made in the absence of the party against whom it was made; or
>
> (*b*) which the Labour Court is satisfied is void or was obtained by fraud or a mistake common to the parties; or
>
> *(b)* in order to correct any patent error.
>
> (2) The Labour Court shall not exercise the powers conferred by subsection (1)–
> *(a)* except upon notice to all the parties affected by the determination or order concerned; or
>
> *(b)* in respect of any determination or order which is the subject of a pending appeal or review.
>
> (3) Where an application has been made to the Labour Court to rescind or vary any determination or order in terms of subsection (1), the Labour Court may direct that—
>
> *(a)* the determination or order shall be carried into execution; or
>
> *(b)* execution of the determination or order shall be suspended pending the decision upon the application;
>
> upon such terms as the Labour Court may fix as to security for the due performance of the determination or order or any variation thereof"

That application ought to have been made simultaneously with an application for condonation and extension of time within which to file its heads of argument in terms of r 26 which provides that:

> "At any time before or during the hearing of a matter a President or the Court may—
>
> (*a*) direct, authorise or condone a departure from any of these rules, including an extension of any period specified therein, where the President or Court is satisfied that the departure is required in the interests
> of justice, fairness and equity;
>
> (*b*) give such directions as to procedure in respect of any matter not expressly provided for in these rules as
> appear to the President of the Court to be just, expedient and equitable"

In terms of r 33 the applicant had 30 days within which to make the above applications for relief in the court *a quo.* From the date it became aware of the so called judgment. This it not do. The so called judgment it seeks to impugn is dated 31 October 2012. It only approached this court for relief about two and a half years later on 15 March 2015. That delay in approaching this Court is lengthy and inordinate. It cannot be the kind of delay occasioned by a party who has the serious intention to prosecute its appeal.

It appears to me that this Application was lodged as an afterthought, simply to circumvent the court *a quo* and throw spanners into the pending execution. The applicant could no longer approach the court *a quo* for relief as it was now woefully out of time. Approaching this Court was an ingenuous way of evading the natural consequences of its inordinate delay in approaching the court *a quo* for relief timeously.

The applicant has not proffered any explanation for the inordinate delay of more than two and a half years before approaching this Court if it was sincere in its belief that the relief it seeks resides in this Court. In any case the applicant ought to have exhausted its

domestic remedies before approaching this Court for relief. For the foregoing reasons I come to the conclusion that there is absolutely no merit in this Application it is accordingly ordered that the application be and is hereby dismissed with costs.

Ziumbe & partners, applicant's legal practitioners

Hungwe & Mandevere, respondents' legal practitioners