REPORTABLE **(32)**

DANIEL TSINGO
v
COMMERCIAL SUGARCANE ASSOCIATION OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, PATEL JA & MAVANGIRA JA
HARARE, 6 OCTOBER 2017 & 10 JULY 2018

T. Magwaliba, for the appellant
V. Makuku, for the respondent

PATEL JA: This is an appeal against the judgment of the Labour Court dismissing an application for condonation for the late filing of heads of argument. The application was dismissed with costs.

The appeal to the Labour Court was filed on 25 September 2012. The respondent then filed its notice of response on 2 October 2012, prior to having received any notification from the Registrar to do so. The respondent also filed its heads of argument on 13 November 2012, before the appellant had filed his heads. The appellant's heads of argument should have been filed in October 2012, but were only filed almost 60 days out of time. The explanation given for this delay was that the concrete ceiling of the appellant's lawyers' office had collapsed and the office became inaccessible until after

31 December 2012. The application for condonation was filed soon thereafter on 11 January 2013.

The respondent objected that the appellant should have informed the court and the other party of its predicament. Additionally, there were no supporting affidavits from the owner of the building and the person or entity that had repaired the ceiling to corroborate the appellant's averments. In other words, there was no evidence of the alleged practical predicament.

The Decision Appealed Against

The Labour Court found that the appellant had been alerted to the insufficiency of its explanation and, since the reason for the delay had been challenged, there was need for the appellant to provide supporting evidence. The court also found that there were no prospects of success in the main appeal against the arbitral award in question. The arbitrator had found that the dismissal of the appellant from the respondent's employment was procedurally and substantively fair.

The court *a quo* noted that in suitable cases condonation may be denied whatever the prospects of success on appeal. It held that this was an appropriate case where condonation should be denied because the appellant had not justified the grant of condonation. The court felt that it should mark its displeasure for the appellant's continued flagrant failure to adhere to the Rules. It accordingly dismissed the application for condonation with costs and directed its Registrar to reset the matter for continuation.

Grounds of Appeal

The notice of appeal herein contained a total of six grounds with multiple sub-grounds of appeal. At the hearing of the matter, counsel for the appellant conceded that the grounds were inconcise, argumentative and repetitive. Furthermore, some of the grounds attacked findings of fact and raised issues not placed before the court *a quo*. Consequently, with the consent of counsel for the respondent, the grounds of appeal were pruned, by striking out a range of superfluous matter, and reduced to only two grounds as amended.

The first ground of appeal is that the court *a quo* misdirected itself in finding that the appellant had violated r 19(1) of the Labour Court Rules and that the delay in filing his heads of argument was inordinate. The second ground is that the court erred in holding that the appellant had no prospects of success on appeal as against the arbitrator's decision.

Violation of the Rules and Length of Delay

Rules 15(1) and 15(2) of the Labour Court Rules 2006, in their relevant portions, govern the noting of appeals and the filing of notices of response, as follows:

> "(1) A person wishing to appeal against any decision, determination or direction referred to in section 97(1)(*a*) or (*b*) of the Act, or on a question of law in connection with any arbitral award in terms of section 98(10) of the
> Act, shall, within twenty-one days from the date when the appellant receives the decision, determination or direction or award, do the following—
>
> (*a*) complete in three copies a notice of appeal in Form LC 3; and
> (*b*) make three copies of any of the documents referred to in subparagraphs (i) to (iv) below as are relevant to the appeal, if they are in the possession of the appellant—……..; and
> (*c*) serve one copy of the notice of appeal, together with a copy of the documents, if any, referred to in paragraph (*b*), on the respondent; and
> (*d*) file with the registrar one of the other copies of the notice of appeal, together with—……..; and

(*e*) retain a copy of the notice of appeal, and of the documents, if any, referred to in paragraph (*b*), for himself or herself.

(2) The registrar shall, within thirty days of receiving a notice of appeal in terms of subrule (1)(*d*), give notice in Part I of Form LC 2 to the respondent—

(*a*) to complete in three copies a notice of response to the appeal in Part II of Form LC 2; and

(*b*) to do the following within fourteen days of the date when the registrar gives notice to the respondent under this subrule—

(i) serve one copy of the notice of response on the appellant; and

(ii) file with the registrar one of the other copies of the notice of response, together with proof (as required by rule 11) that the notice of response was served on the appellant; and

(iii) retain a copy of the notice of response for himself or herself; and

(*c*) if the notice of response indicates that the respondent wishes to contest the appeal, …….. to do the following …….. .”

Rule 19(1) appertains to the filing of heads of argument by a legally represented applicant or appellant:

“(1) Where an applicant or appellant is to be represented by a legal practitioner at the hearing of the application, appeal or review, the legal practitioner shall—

(*a*) within fourteen days of receiving a notice of response to the application, appeal or review, lodge with the registrar heads of argument clearly outlining the submissions he or she intends to rely on and setting out the authorities, if any, which he or she intends to cite; and

(*b*) immediately afterwards deliver a copy of the heads of argument to the respondent and lodge with the registrar proof of such delivery as required by rule 11.”

In casu, it is common cause that the appellant was legally represented in the appeal before the Labour Court and that he was duly served with the respondent’s notice of response and heads of argument. It is also not in dispute that the respondent so acted without receiving any notification to do so in terms of r 15(2). In any event, r 19(1) required the appellant to file his heads of argument within 14 days of receiving the respondent’s notice of response.

The argument advanced by Mr *Magwaliba*, on behalf of the appellant, is that the Registrar's failure to issue a notice to the respondent in terms of r 15(2) rendered the respondent's notice of response invalid. Consequently, so the argument goes, the appellant did not breach r 19(1) and, therefore, he could not have been barred in the absence of strict compliance with the Rules.

This argument, in my view, is entirely specious for the simple reason that it is the appellant who was the *litis dominus* in the appeal proceedings before the court *a quo*. It was he who had noted the appeal and had served his notice of appeal on the respondent. The fact that the Registrar did not notify the respondent within 30 days and that the respondent, having been served with the notice of appeal, pre-empted the Registrar's notice should not and could not have prejudiced the appellant in the prosecution of his appeal. On the contrary, it expedited the proceedings and nothing was advanced by the appellant to suggest that he was prejudiced by the respondent's conduct. This is a clear instance where the appellant's reliance on mere technicalities should not be allowed to hinder or frustrate the expeditious administration of justice.

I now turn to the appellant's explanation for the delay in filing his heads of argument and the length of that delay. It would appear that the justification proffered on his behalf is not entirely implausible. However, its veracity is undermined by the absence of any corroborative evidence to substantiate the appellant's alleged inability to access his office. Although he had been fully apprised of the insufficiency of his allegations, *i.e.* without any supporting affidavits from the owner of the building and/or the person or entity

that had repaired the collapsed ceiling, he did nothing to obtain the requisite affidavits. The fact that his lawyer, who arguably would be unlikely to fabricate the facts, had filed a supporting affidavit did not excuse the appellant from corroborating his averments in this respect with independent evidence on oath.

As for the length of the delay that intervened before the appellant filed his heads of argument, there can be no doubt that a delay of almost 60 days is grossly inordinate. Counsel for the appellant did not, and could not, contend otherwise. It is trite that condonation for failure to comply with the Rules is not to be granted as matter of course. In the absence of any acceptable explanation for the delay and the appellant's obviously flagrant disregard of the Rules, I am unable to perceive any error or misdirection by the court *a quo* in the exercise of its discretion to decline the appellant's application for condonation.

Prospects of Success on Appeal

Mr *Magwaliba* argues that the merits of the appeal before the Labour Court raise an interesting point of law relative to the application of the Labour (National Employment Code of Conduct) Regulations 2006, S.I. 15 of 2006 (the National Code). He contends that the court below did not weigh the importance of this point of law in considering the prospects of success on appeal, as compared with the degree of the appellant's non-compliance with the Rules.

In particular, Mr *Magwaliba* submits that the National Code does not automatically apply to every workplace where there is no registered code of conduct in force. Section 101 of the Labour Act [*Chapter 28:01*] provides for the registration of specific codes of conduct. It also enables the Minister of Labour to publish model codes of conduct and allows a works council or employment council to adopt any such model code. However, so it is argued, a works council or employment council cannot adopt a model code without applying to have it registered. The National Code has been enacted in terms of s 101 of the Labour Act and therefore requires an application for its registration before it can be adopted and applied to any given industry or undertaking. Consequently, in the absence of proof of compliance with s 101 of the Act, the respondent *in casu* had no authority to proceed against the appellant in terms of the National Code.

When interrogated by the Court as to the specific provisions of the National Code, Mr *Magwaliba* initially contended that there was nothing in the Code to contradict his position. However, when confronted with the provisions of s 5 of the Code, following Mr *Mukoko's* arguments in reply, he submitted that this section did not absolve a works council or employment council from complying with s 101 of the Labour Act. This was so because the National Code constitutes subsidiary legislation which cannot override the provisions of the enabling Act.

Section 101 of the Labour Act governs the registration of employment codes of conduct. In the portions relevant for present purposes, it provides as follows:

> "(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) …….. .

(1b) …….. .

(1c) …….. .

(2) On application being made in terms of subsection (1), the Registrar shall, if he is satisfied that the employment code concerned provides for the matters referred to in subsection (3), register the employment code in the manner prescribed.

(3) An employment code shall provide for—

(*a*) the disciplinary rules to be observed in the undertaking, industry or workplace concerned, including the precise definition of those acts or omissions that constitute misconduct;

(*b*) the procedures to be followed in the case of any breach of the employment code;

(*c*) the penalties for any breach of the employment code, which may include oral or written warnings, fines, reductions in pay for a specified period, suspension with or without pay or on reduced pay, demotion and dismissal from employment;

(d) – (g) …….. .

(4) …….. .

(5) …….. .

(6) …….. .

(7) …….. .

(8) …….. .

(9) The Minister may, after consultation with representatives of trade unions and employers organizations, by statutory instrument publish a model employment code of conduct.

(10) An employment council or works council may, by making application in terms of subsection (1), adopt the model employment code referred to in subsection (9), subject to such modifications as may be appropriate to the industry, undertaking or workplace concerned."

In registering an employment code of conduct, an employment council or works council has one of two options. Under the first option, it may craft its own code and apply to the Registrar in terms of s 101(1) of the Act to have it registered. If the Registrar is satisfied that the code conforms with the essentials prescribed in s 101(3), he is required by s 101(2) to have it registered. The second option is for the employment council or works council to adopt, with or without modifications, a model employment code of conduct

published by the Minister under s 101(9). It does so under s 101(10) by applying for its registration in terms of s 101(1). In both instances, the process of registration is the same, *i.e.* through the office of the Registrar. And in both instances, the process is optional. There is no mandatory obligation, either to formulate a specific code or to adopt a model code.

The obvious and inescapable implication is that, unless the employment council or works council applies to register either type of code, the industry, undertaking or workplace concerned would be obliged to operate without a binding code to deal with questions of misconduct. In particular, there would be nothing, other than what might possibly be spelt out in written contracts of employment, to formally regulate, *inter alia*, the disciplinary rules to be observed, the procedures to be followed and the penalties that might be imposed in cases of alleged misconduct. Employees would be left largely unguided as to how to conduct themselves at their respective workplaces. Employers would be at large to prefer unpredictable charges of misconduct, implement arbitrary disciplinary procedures and mete out inequitable penalties for misconduct. In short, the position advanced by counsel for the appellant in interpreting s 101 of the Act is tantamount to espousing nothing less than a recipe for chaos in labour relations.

While I accept that it is not for the courts to devise solutions to possible *lacunae* in statute law, I think that they should nevertheless be astute to eschew any statutory construction which might entail irrational or anomalous consequences and grave injustice. It is axiomatic that the legislature must be presumed to have legislated enactments that are procedurally and substantively fair and reasonable. Furthermore, as is explicitly recognised

in s 2A(1) of the Labour Act, the purpose of the Act is "to advance social justice and democracy in the workplace by ... the promotion of fair labour standards [and] ... securing the just, effective and expeditious resolution of disputes and unfair labour practices". Section 2A(2) reinforces the role of the courts and other tribunals in this regard by exhorting them to construe the Act "in such manner as best ensures the attainment of its purpose". There can be no doubt that the construction of s 101 of the Act advocated on behalf of the respondent would obstruct rather than promote fair labour standards. It would also frustrate the just, effective and expeditious resolution of disputes and unfair labour practices.

Having regard to the foregoing, I take the view that s 101 of the Act must be construed and applied in a manner that facilitates the implementation of fair and transparent disciplinary processes at the workplace generally. On this premise, the application of a model code published under s 101(9) should not be restricted to only those instances where it has been registered pursuant to an application in terms of s 101(10) as read with s 101(1). The fact that no such application is made by an employment council or works council does not preclude the Minister from extending the application of a model code to any industry, undertaking or workplace that is not covered by any binding code of conduct. There is nothing in s 101(9) itself, either expressly or by necessary implication, to indicate anything to the contrary. This interpretation of s 101, taken as a whole, accords with the purposive construction enjoined by s 2A of the Act. I am also fortified in this view by the requirement that the Minister must first consult with representatives of trade unions

and employers' organizations before he proceeds to publish a model employment code of conduct.

The National Code was enacted by the Minister in terms of s 101(9) of the Labour Act. The objectives of the Code are enunciated in s 3 as follows:

> "The objectives of the code shall, among other issues include the following—
> (*a*) to provide machinery for careful investigation of offences before corrective/disciplinary action can be administered; or
> (*b*) to ensure consistency and prompt action by the responsible/ administering official or committee on issues concerning discipline; or
> (*c*) to ensure equating an offence to the resultant corrective action allowing for mitigation or aggravating factors; or
> (*d*) to provide guidelines on procedural and substantive fairness and justice in handling disciplinary matters at the workplace."

Section 4 of the National Code enumerates the offences that an employee may commit which constitute "serious misconduct". Section 5 of the Code deals with the termination of contracts of employment in the following terms:

> "No employer shall terminate a contract of employment with an employee unless—
> (*a*) the termination is done in terms of an employment code which is registered in terms of section 101(1) of the Act; or
> (*b*) in the absence of the registered code of conduct mentioned in (*a*), the termination is in terms of the National Employment Code of Conduct provided for under these regulations; or
> (*c*) the employer and employee mutually agree in writing to the termination of the contract; or
> (*d*) the employee was engaged for a period of fixed duration or for the performance of a specific task and the contract of employment is terminated on the expiry of such period or on the performance of such task."

The meaning of s 5(a) taken together with s 5(b) of the National Code is clear and unambiguous. An employer cannot terminate a contract of employment on the

ground of misconduct except in accordance with a registered code of conduct or, in the absence of any such code, in accordance with the National Code. In my view, these provisions are perfectly consistent with the overall interpretation of s 101 of the Labour Act that I have expounded above. They do not purport to override the Act but rather operate to complement its provisions. Moreover, they are clearly *intra vires* the specific code-making power of the Minister under s 101(9) as read with his broad power to frame regulations under s 127(1), which provides that:

> "(1) The Minister may make regulations prescribing anything which, in terms of this Act, is to be prescribed or which in his opinion, is necessary or convenient to be prescribed, for carrying out or giving effect to this Act."

I would also observe that the objectives set out in s 3 of the National Code are entirely concordant with the broad purpose of the Labour Act as enshrined in s 2A of the Act. In turn, s 5 of the National Code resonates with both that purpose and those objectives by ensuring that the conduct of disciplinary matters at the workplace is duly subjected to the requirements of procedural and substantive fairness in every case.

Ultimately, over and above the National Code, there is s 12B of the Labour Act (inserted by Act No. 17 of 2002 and amended by Act No. 7 of 2005) which governs the dismissal of employees and which puts the matter under consideration beyond any possible controversy. Subsections (1) and (2) of section 12B stipulate that:

> "(1) Every employee has the right not to be unfairly dismissed.
> (2) An employee is unfairly dismissed—
> (*a*) if, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or
> (*b*) in the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9)."

In similar vein, s 12(4a) of the Labour Act (inserted by Act No. 5 of 2015) regulates the termination of contracts of employment on notice in the following terms:

> "No employer shall terminate a contract of employment on notice unless—
> (*a*) the termination is in terms of an employment code or, in the absence of an employment code, in terms of the model code made under section 101(9); or
> (*b*) the employer and employee mutually agree in writing to the termination of the contract; or
> (*c*) the employee was engaged for a period of fixed duration or for the performance of some specific service; or
> (*d*) pursuant to retrenchment, in accordance with section 12C."

Although these provisions are specifically concerned with dismissal and termination on notice, in contrast with the termination of employment generally, they replicate the formulation adopted in s 5 of the National Code, *viz.* that the termination of a contract of employment must be effected in terms of a registered employment code or, in the absence of any such code, in terms of the National Code made under 101(9) of the Act. Moreover, the fact that they are embodied in the Act itself totally undermines and renders irrelevant the argument, albeit correct in principle, that the National Code constitutes subsidiary legislation which cannot override the provisions of the enabling Act.

Disposition

In the result, the appeal cannot succeed on either of the subsisting grounds of appeal. I conclude that the court *a quo* cannot be regarded as having misdirected itself in finding that the appellant had violated r 19(1) of the Labour Court Rules and that the delay in filing his heads of argument was inordinate. I also conclude that the court *a quo* did not err in holding that the appellant had no prospects of success on appeal as against

the arbitrator's decision upholding the respondent's resort to the National Code in terminating the appellant's contract of employment.

As regards costs, in its heads of argument the respondent seeks costs on a legal practitioner and client scale. However, at the hearing of the appeal, counsel for the respondent did not rise to motivate any justification for an order of punitive costs. In any event, I am unable to perceive any valid reason for awarding such costs.

It is accordingly ordered that the appeal be and is hereby dismissed with costs on the ordinary scale.

GWAUNZA JA: I agree.

MAVANGIRA JA: I agree.

Kwirira & Magwaliba, appellant's legal practitioners

Ndlovu & Hwacha, respondent's legal practitioners