REPORTABLE (08)

TREGER PLASTICS (PRIVATE) LIMITED
v
VACSON DUBE

SUPREME COURT OF ZIMBABWE
HARARE: 29 OCTOBER 2024 & 31 JANUARY 2025

K. Kachambwa, for the applicant.

N. Mazibuko, for the first respondent.

IN CHAMBERS

UCHENA JA:

[1] This is an opposed application for condonation and extension of time within which to apply for leave to appeal and for leave to appeal made in terms of s 92F (3) of the Labour Act [*Chapter 28:01*] as read with r 43 (3) and 60 (2) of the Supreme Court Rules 2018.

FACTUAL BACKGROUND

[2] The applicant is a company with limited liability duly registered in terms of the laws of Zimbabwe. The respondent is a former employee of the applicant who was employed as the planning manager. The respondent was charged in terms of s 4 (a) and (b) of the Labour (National Employment Code of Conduct) Regulations, 2006 ("SI 15 of 2006"). The applicant averred that the respondent had committed acts of misconduct and omission inconsistent with the fulfilment of the express or implied conditions of his contract of employment, and had wilfully disobeyed a lawful order. The allegations were that during

one of the production meetings the respondent disrespected and disobeyed an order of the managing director. He further incited and urged other management employees present at the meeting to join in his confrontation with the managing director.

[3] The managing director requested the respondent to leave the meeting. The respondent refused to obey that instruction. He was as a result of that conduct suspended from employment on 5 September 2023 and charged with misconduct for contravening s 4 (a) and (b) of S.I 15 of 2006. A disciplinary hearing was conducted, the respondent was found guilty of the charge and dismissed from employment. The respondent appealed to the appeals officer. The appeal was dismissed. On 12 December 2023, the respondent filed an application for review in the Labour court ('court *a quo*'). The respondent submitted that the proceedings before the hearing officer were irregular in that he was not allowed to give a background history of the growing tension between him and the managing director. He further alleged that he had no input in the appointment of the disciplinary authority and the disciplinary authority was chaired by an employee who, subordinate to the Managing Director as such he could not have ruled against the applicant. The respondent therefore submitted that s 6 (4) of S.I 15 of 2006 which allowed for the arbitral appointment of a disciplinary authority was a violation of ss 68 and 69 of the Constitution. The court *a quo* held that the proceedings before the disciplinary authority were irregular as the respondent was not given the right to be heard. The applicant argued that the court *a quo* erred in holding that the disciplinary authority was subordinate to the complainant who is the Managing Director who, and played a role in the appointment of the disciplinary authority and this vitiated the proceedings. The court *a quo* held that the evidence on record showed that the complainant, being the managing director, was senior to the chairman of the disciplinary authority. The court *a quo* further held that

the record was clear that the complainant had a hand in the appointment of the disciplinary authority. The court *a quo* therefore ordered that the decision by the disciplinary authority be set aside.

[4] Aggrieved by this finding the applicant sought leave to appeal from the court *a quo*. The application for leave to appeal was dismissed. The applicant still wishes to appeal against the judgment of the Court *a quo* but it is out of time hence the present application.

RELIEF SOUGHT

[5] The applicant seeks the following relief:

IT IS ORDERED THAT:

"1. The application for condonation for non-compliance with r 60 (2) of the Rules of the Supreme Court, 2018 and extension of time within which to apply for leave to appeal be and is hereby granted.

2. The application for leave to appeal against the judgment of the Labour Court issued under judgment no LCMT 11/24 be and is hereby granted.

3. The applicant shall file its notice of appeal within 5 days of the date of this order.

4. Each party shall bear its own costs."

SUBMISSIONS BEFORE THIS COURT

[6] Mr *Kachambwa,* counsel for the applicant, submitted that the applicant has since rectified the errors that led to the striking off of a prior application. He averred that the delay is not inordinate and that the explanation for the delay is reasonable. He argued that the grounds of appeal raise questions of law. Counsel further stated that the court *a quo* erred in finding that there was bias in the disciplinary proceedings. He stated that the applicant had no control over the fact that the disciplinary hearing was conducted by laymen. He submitted that there

was no prejudice on the part of the respondent hence the court *a quo* can be faulted for holding that there was bias in the manner in which the disciplinary hearing was conducted.

[7] Mr *Mazibuko*, counsel for the respondent, argued that he was abiding by the papers filed of record. He submitted that the explanation for the delay was unreasonable. He stated that the applicant failed to give a reasonable explanation of the delay after SCB 83/24 was struck off the roll. In respect of the prospects of success, counsel for the respondent submitted that the intended grounds of appeal lack merit. He averred that the application ought to be dismissed with costs on a punitive scale.

ISSUES FOR DETERMINATION

[8] The issues for determination in this matter are as follows:

1. Whether the intended grounds of appeal raise questions of law.
2. Whether or not the applicant has satisfied the requirements for condonation.

THE LAW

[9] It is trite that appeals to the Supreme Court, relating to labour matters must be on questions of law. This is provided for in s 92 F (1) of the Labour Act [*Chapter 28:01*] which states that,

> "An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court."

What constitutes a question of law was clearly explained in the case of *Muzuva* v *United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) where the court held that: -

> "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 also the remarks of Garwe JA in *Sable Chemical Industries Limited* v *David Peter Easterbrook* SC 18/10 at p 5."

See also the case of *Zvokusekwa* v *Bikita* R.D.C SC 44/15.

APPLICATION OF THE LAW TO THE FACTS

1. Whether or not the grounds of appeal are on questions of law.

[10] The intended, first ground of appeal raises the issue of whether or not the court *a quo* erred in holding that proceedings before the disciplinary authority were irregular. The applicant further challenges the finding by the court *a quo* that there was a possibility of bias in the proceedings before the Disciplinary Authority. The applicant further challenges the finding by the court that the respondent had not been afforded a right to a fair hearing. Additionally, the applicant questions whether the court *a quo* properly applied the test that ought to be used in proving bias before a tribunal or court. The issues capable of disposing of the matter are whether or not there was bias and whether or not the respondent was afforded the right to be heard. The presence or absence of bias is determined by considering the law on when a court can be said to be biased. The question of whether or not a litigant has been afforded a right to be heard is determined by what the law provides in respect of a party's right to be heard. It is therefore, apparent that the intended grounds of appeal raise questions of law.

2. Whether or not the applicant has satisfied the requirements for condonation.

[11] **Extent and reasonableness of delay**.

Leave to appeal from the court *a quo* was refused on 21 June 2024. In terms of r 60 of the Supreme Court Rules, 2018 the applicant had ten days to apply to a judge of this court for leave to appeal after the court *a quo's* refusal to grant it leave to appeal. The applicant ought to have filed its application for leave to appeal with this Court by 5 July 2024. The applicant's initial application was filed within the time provided for by r 60. The present application was filed three months out of time because the earlier application was struck off the roll. It is my view that the delay is not inordinate and can be condoned.

[12] In explaining the delay the applicant submitted that the application for leave to appeal before this Court had been previously filed on time. However, that application was struck off the roll for the reason that the application was fatally defective. This Court held that the founding affidavit had not been properly commissioned and the board resolution attached to the founding affidavit was inadequate. The applicant submits that it was only able to rectify the above defects after the board had met in August 2024.

[13] The explanation given by the applicant is reasonable as the applicant is a company and had to rectify the issue of the resolution in the Board meeting held in August 2024. Notwithstanding the above, the inquiry does not end with the reasonableness or otherwise of the explanation for the non-compliance with the rules. The present application is a composite application. The applicant seeks condonation for late filing of an application for leave to appeal and leave to appeal. To succeed the application for condonation and leave to appeal is expected to satisfy the court that the intended appeal has prospects of succeeding. I now turn to consider, whether or not the intended appeal has prospects of success.

PROSPECTS OF SUCCESS ON APPEAL

[14] The legal principles applicable to applications for leave to appeal are set out in a plethora of cases. In the case of *Chikafu* v *Dodhill (Pvt) Ltd & Anor* 2009 (1) ZLR 293 (S) it was stated that one of the issues in an application for leave to appeal is the existence or otherwise of reasonable prospects of success. The Court at p 294 para G held as follows:

> "The issue that falls for determination in this application is whether Chikafu has prospects of success in an appeal against the judgment of BERE J. I concluded that Chikafu has prospects of success on appeal. I accordingly granted leave to appeal".

[15] The same sentiments were also stated in *Mpofu* v *NSSA* SC 105/22, at p 2 where it was held as follows:

> "In an application of this nature, an applicant must satisfy the court that he or she has prospects of success in the intended appeal before the court can grant leave to appeal. In other words, this court performs a gatekeeping function to keep out any proposed appeals without merit. This is done to avoid clogging the appeals roll with cases which will not succeed."

In *Essop* v *S* (31/2016) [2016] ZASCA 114, the court in defining prospects of success held that:

> "What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[16] The applicant argued that the intended appeal has prospects of success. A consideration of proposed grounds of appeal numbers one and two of the intended appeal establishes that the applicant is aggrieved by the court *a quo's* finding that there was bias, in that the Disciplinary

Authority (DA) was subordinate to the complainant and that the complainant played a role in the appointment of the Disciplinary Authority. The applicant further submitted that the court *a quo* erred in holding that the Disciplinary Authority was biased without any evidence to that effect being led. In *Masedza & Ors* v *Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H) at 45A the court quoted with approval the case of *Metropolitan Properties* v *Lannon & Ors* [1969] 1 KB 577 where the court stated:

> "In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice…..or whoever it is who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as unbiased as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit."

[17] Further, in Geo Quinot's "Administrative law: Cases and Materials" Second Edition at p 539 it was stated as follows:

> "While it is true that the duty to act fairly and listen to both sides lies upon everyone who decides anything, one should be careful not to treat administrative tribunals as though they were courts of law……. The test in matters of this nature is whether the hearings were fair when proceedings are judged in their broad perspective. We should not lose sight of the fact that one is here dealing with disciplinary hearings presided over by largely laymen. Therefore they cannot be expected to observe all the finer niceties that would have been observed by a court of law. It appears that every effort was made to give the first applicant a fair opportunity to be heard before an impartial tribunal…'
>
> To establish bias the onus rests on the person alleging bias to show that:
> (i) The bias was clearly or actually displayed or;
> (ii)That in the circumstances there was a real possibility of bias."

[18] The applicant further argues that the court *a quo* erred in holding that the disciplinary authority was subordinate to the complainant and the complainant played a role in the

appointment of the disciplinary authority and this vitiated the proceedings. The court *a quo* held that the evidence on record showed that the complainant, being the managing director, was more senior than the chairman of the disciplinary authority. The court *a quo* further held that the record was clear that the complainant had a hand in the appointment of the disciplinary authority. On record, the complainant is recorded to have acknowledged that she played a role in the appointment of the disciplinary authority. The court *a quo* quoted this acknowledgment as follows:

> "As the Managing Director she reports to the shareholders and she has the power and right to suspend employees. She said Mr Morris Tregger stated that "I am sure knowing Mr B Mangena, the matter will be dealt with in the most professional and fair way" as indicated that this decision was made by management and myself as the Managing Director, that is where we stand."

[19] In light of this, the court *a quo* found that the complainant was playing the role of both the complainant and the prosecutor. The complainant was not supposed to have been involved as an interested party. The complainant also received witness statements which were copied to her by the witnesses. These were statements made by witnesses who were to testify before the Disciplinary Authority. In the circumstances, there was a real possibility of bias on the part of the Disciplinary Authority. Thus the court *a quo* is not likely to be faulted for holding that there was bias. Consequently, it is my considered view that the first and second intended grounds of appeal have no prospects of success on appeal.

[20] The applicant also alleged that the court *a quo* erred at law and grossly misdirected itself on the facts in holding that the employee was denied the right to be heard and not allowed to present the historical background of the alleged acrimonious relationship between him and the managing director. A reading of the record establishes that the respondent alleged that

he was prevented from presenting his defence concerning the acrimonious history between himself and the complainant. Thus, he claimed the violation of the *audi alteram partem* rule. In *Metsola* v *Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147(SC) at 154, GUBBAY JA (as he then was) held as follows:

> "The *audi* maxim is not a rule of fixed content, but varies with the circumstances. In its fullest extent, it may include the right to be apprised of the information and reasons underlying the impending decision; to disclosure of material documents; to a public hearing and, at that hearing, to appear with legal representation and to examine and cross-examine witnesses. See, generally, Baxter *Administrative Law* at pp 545-547. The criterion, as I have noted, is one of fundamental fairness and for that reason the principles of natural justice are always flexible. Thus the "right to be heard" in appropriate circumstances may be confined to the submission of written representations. It is not the equivalent of a "hearing" as that term is ordinarily understood."

See also the case of *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S)

[21] In *casu*, the respondent had an opportunity to present his defence in his defence outline. I am inclined to agree with the applicant's averment that the respondent only chose to confine himself to procedural issues in the defence outline. It is not a denial of a right to be heard if a person fails to exercise such right when given an opportunity to do so. The defence on the acrimonious history was officially placed before the Disciplinary Authority by the respondent in his oral evidence. When investigations were being conducted, the respondent was requested to write a report of what took place at the production meeting on 4 September 2023. The respondent wrote a detailed report setting out the defence and reasons concerning his conduct on that day. The facts included the alleged acrimonious history between the applicant and the complainant. In essence, the report was a detailed statement of defence.

[22] In addition, when the respondent was testifying and giving his oral evidence, he decided to incorporate the report into his evidence. I agree with the applicant's contention that the respondent exercised his rights to a fair hearing. The respondent presented the evidence concerning the acrimonious history through his report. He also exercised his right to cross-examine the complainant on this issue. Unfortunately, the cross-examination did not yield the result he wanted. However, that does not amount to infringement of a right to be heard. Therefore, the court *a quo* mighty be faulted for holding that the respondent was denied the right to be heard. Therefore, this ground of the intended appeal has prospects of success on appeal.

DISPOSITION

[23] In view of the findings that the delay is not inordinate, that the explanation of the delay is reasonable and that the appeal has prospects of success, the applicant's application for condonation and leave to appeal should be granted.

[24] It is therefore ordered as follows:

1. The application for condonation for non-compliance with Rule 60 (2) of the Rules of the Supreme Court 2018 and for extension of time within which to apply for leave to appeal be and is hereby granted.

2. The application for leave to appeal against the judgment of the Labour Court issued under Judgment No LCMT11/24 be and is hereby granted.

3. The applicant shall file its Notice of Appeal within 15 days of the date of this order.

4. Each party shall bear its own costs.

Coglan & Welsh, appellant's legal practitioners.

Calderwood, Bryce Hendrie & Partners, respondent's legal practitioners.