REPORTABLE (32)

ERICKSON MVUDUDU
v
AGRICULTURAL AND RURAL DEVELOPMENT AUTHORITY (ARDA)

SUPREME COURT OF ZIMBABWE
HARARE: 24 JANUARY 2024

The applicant in person

No appearance for the respondent

Chamber Application

MWAYERA JA

1. On 24 January 2024 I issued an *ex tempore* judgment in which I struck the matter off the roll with no order as to costs. The applicant has requested for full reasons for the judgment. These are they:

2. The applicant approached this Court seeking condonation for the late noting of an appeal for non-compliance with r 59 of the Supreme Court Rules, 2018 ("the rules") and extension of time within which to appeal. The application was unopposed as the respondent did not file any opposing papers. After hearing the applicant and having considered the written documents filed of record, the order referred to in the first paragraph was issued.

FACTUAL BACKGROUND

3. The applicant was employed by the respondent as its Chief Executive Officer/General Manager from 1 January 2008. On 19 May 2009, the respondent terminated the applicant`s

employment. Irked by the termination, the applicant referred the dispute to a labour officer for conciliation. Conciliation failed and thus the dispute was referred for arbitration.

4. The Arbitrator, held that the applicant's dismissal from employment was unlawful and the termination was set aside. The Arbitrator also ordered reinstatement and that in the event that reinstatement was no longer tenable, the parties were to negotiate damages *in lieu* of reinstatement.

5. The respondent appealed to the Labour Court (*"court a quo"*) while the applicant cross appealed. The court *a quo* ordered that the applicant be paid back pay and benefits as damages for loss of employment. The respondent thereafter appealed to this Court which remitted the case to the Arbitrator for quantification of damages.

6. Subsequently the case was placed before an Arbitrator, who gave an interim arbitral award in July 2017. He dismissed all preliminary points raised and proceeded to quantify damages.

7. Aggrieved by the decision of the Arbitrator, the applicant noted an appeal to the Court *a quo* which appeal was dismissed. Disgruntled by that decision, the applicant filed an application for leave to appeal in the court *a quo*. During the hearing of that application, he also made an oral application for referral of his matter to the Constitutional Court in terms of s 175 (4) of the Constitution of Zimbabwe. In respect of the application for referral, he submitted that his fundamental rights had been infringed by the respondent`s management, the non-executive board members, the Arbitrators and the courts. The court *a quo* held that the Constitutional issues could not be revisited in that Court and it dismissed the application.

8. The applicant was granted leave to appeal to this Court. He appealed under case number SC 26-23, which appeal was struck off the roll for the reason that it was fatally defective. This resulted in the applicant filing this Chamber application for condonation of the late noting of an appeal and for an extension of time within which to note an appeal. The appellant sought the following relief:

> "1. The application for condonation for non-compliance with r 59 as read with r 60 of the Rules of the Supreme Court, 2018 be and is hereby granted.
> 2. The application for extension of time within which to file and serve notice of appeal in terms of the rules be and is hereby granted.
> 3. The notice of appeal shall be deemed to have been filed on the date of this order (or on such date as may be fixed by the judge.)
> 4. Each party shall bear its own costs."

SUBMISSIONS BEFORE THIS COURT:

9. The applicant submitted that his application was for condonation of late filing of a notice of appeal. He submitted that the founding affidavit was in support of the application and that the grounds of appeal were clear and concise. He further submitted that the relief sought was competent as he attended to and corrected it. Upon engagement with the court on the founding affidavit not relating to the explanation for the delay and prospects of success on appeal, he submitted that his application was an omnibus one to the Constitutional Court. As such he maintained that he had to be heard on the merits of the condonation application and that the issues be referred to the Constitutional Court.

ISSUES FOR DETERMINATION

10. (1) Whether or not the application is properly before the court.

(2) Whether or not the applicant has satisfied the requirements for the grant of condonation.

THE LAW

12. Rule 61 of the rules of this Court allows a party who has infringed the rules to approach this Court and seek condonation. The rule is couched in the following manner:

> "61. Save where it is expressly or by necessary implication prohibited by the enactment concerned, a judge may, if special circumstances are shown by way of an application in writing, condone the late noting of the appeal and extend the time laid down, whether by rule 60 or by the enactment concerned, for instituting an appeal."

13. The requirements for an application for condonation of non-compliance with the rules have been pronounced with clarity in a plethora of cases by this Court. In the case of *Zimind Publishers (Pvt) Ltd* v *R.G. Chirenda N.O & Anor* SC 96/24 at p 4, CHATUKUTA JA made the following pertinent remarks:

> "An application for condonation is a formal request made by a party for its non-compliance with the procedural rules of court to be condoned. It is trite that the applicant must satisfy the court that the failure to comply with rules was not wilful and that the length of breach was not inordinate. The applicant must also establish that there are prospects of success on appeal that warrant the court to excuse the non-compliance." (Underlining for emphasis)

See also *Rita Mbatha* v *Justice Catherine Bachi-Muzawazi* SC 76/24, *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S).

14. The general principle emanating from the above cited cases is that for an applicant to succeed in getting condonation he or she must prove that the delay is not inordinate, the explanation for the delay is reasonable and that there are reasonable prospects of success on appeal.

15. It is worth noting that these factors are not individually decisive but rather cumulatively considered and weighed. See the case of *Easter Mzite* v *Damafalls Investments (*Pvt) *Ltd & Anor* SC 21/18.

APPLICATION OF THE LAW TO THE FACTS

16. The requirements mentioned above ought to be clearly established in the founding affidavit which is the basis of the applicant`s case. It is settled that the purpose of a founding affidavit is to state the applicant`s case and inform the respondent of the issue he ought to answer to. It follows therefore, that the founding affidavit has to be drafted in a manner that is coherent and easy to follow even for the court as is not its duty to sift through a founding affidavit and try to work out what the applicant`s case is.

17. It is in the founding affidavit that the applicant states his case and gives an explanation to the court as to why he was late in noting the appeal and demonstrate whether he enjoys good prospects of success on appeal. It is trite that an application stands or falls on the founding affidavit.

18. This principle was ably outlined in the case of *Chironga* & *Anor* v *Minister of Justice Legal & Parliament Affairs & Ors* CCZ 14/20, at p 8, where the Court stated as follows.

> "It is trite that an application stands or falls on the averments made in the founding affidavit. See Herbsten & Van Winsen, The Civil Practice of the Superior Courts in South Africa 3rd ed (herein after 'Herbstein & Van Winsen or the Authors') p 80 where the authors stated that:
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> > 'The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his affidavit and the facts alleged therein and, that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his relying affidavits will be struck out'".

19. The same principle was reiterated by this Court in the case of *Central African Building Society* v *Finormacg Consultancy (Private) Limited & Anor* SC 56/22 in which this Court stated that:

> "It is trite that an application stands or falls on its founding affidavit. The founding affidavit sets out the case that a respondent is called upon to answer. The principle

was aptly set out in *Austerlands (Pvt) Ltd* v *Trade & Investment Bank Limited & Ors* SC 92/05. CHIDYAUSIKU CJ remarked at p 8 as follows:

> 'The general rule that has been laid down in this regard is that on application stands or falls on the founding affidavit and the facts alleged in it. This is how it should be, because the founding affidavit informs the respondent of the case against the respondent that the respondent must meet. The founding affidavit sets out the facts which the respondent is called upon to affirm or deny.'"

20. *In casu,* the affidavit does not set out clearly the case that the respondent has to answer to. The applicant in the founding affidavit alludes to five preliminary points. He states as follows:

> "The following preliminary points are points of law and apply to <u>all proceedings</u> between the parties." (Underlining for emphasis)

From the above narration, it is clear that the applicant is making averments which do not relate to the alleged application for condonation. He, in the first preliminary point, avers that there was no notice of renunciation of agency and notice of assumption of agency in terms of r 25, hence the respondent did not have a right of audience in respect of the matter that was before the Labour Court.

21. In the second preliminary point the applicant states that the respondent had no locus standi to be heard by the Arbitrator, Labour Court, Supreme Court and the Constitutional Court. Regarding the third preliminary point, the applicant also challenges the *locus standi* of the respondent. In the fourth point, the applicant impugned the constitutionality of s 89 (2) (c) of the Labour Act [*Chapter 28:01*].Lastly, the fifth point is to the effect that all these Court proceedings are nullities at law and border on corruption and are criminal in nature.

22. The narration of part of the contents of the founding affidavit highlighted above, is to demonstrate that the founding affidavit does not begin even remotely, to relate to the issue of condonation as reflected on the face of the documents filed. There is no relation to

condonation, no explanation is proffered of the existence of prospects of success. The applicant, on being engaged by the court, on the glaring defects in his founding affidavit persisted that his application was for condonation as he had filed an omnibus application to the Constitutional Court.

23. A cumulative consideration of the applicant's written and oral submissions does not clearly disclose the case which he seeks to relay. His founding affidavit does not establish any basis for condonation. The judgment that the applicant seeks to impugn was handed down on 26 March 2021. In terms of the rules the applicant ought to have noted the appeal within 15 days that is on or before 21 April 2021. He only approached the court on 24 January 2024 which is approximately 3 years out of time. Such delay is not elucidated in the founding affidavit; nor does he give an explanation for the delay.

24. Part of the founding affidavit reads as follows:-

> "It is worth of note to highlight to this Honourable Court that noting of an appeal on 18 January 2023 was as a result of granting of condonation and leave to appeal by the Labour Court, suffice to say that at the time they were granted the present irregularities went unnoticed by the court *a quo* in the same manner this irregularity escaped my mind. Therefore, this oversight is not out of the ordinary. This is however not to trivialise the default on the non-compliance with the rules of this Court. Further, it is very embarrassing that I find myself on the wrong side of the law vis-à-vis the non-compliance with the rules of this Court. I must confess that about what transpired and I believe I have learnt my lesson and will take precautionary measures in future to avoid this telling embarrassment to recur." (sic)

From the above, it can be gleaned that the applicant is not in any way proffering an explanation for the delay, neither does he address the prospects of success on appeal. The founding affidavit is conspicuous for not relating to the requirements which must be satisfied in an application for condonation for non-compliance with rules of this Court. Given the undisputed principle that the application stands or falls on the founding affidavit,

failure to align it to the requirements of the intended application renders it defective. For that reason, there is no proper application before this Court.

25. The purported application is further afflicted by the fact that the notice of appeal is defective for the reason that the grounds of appeal are not precise and concise. Further, the relief being sought is incompetent and defective. Rule 59 (3) of the Rules of this Court provides that:

> "**59 (3)** The notice of appeal shall state: -
> (a) …..
> (b) ….
> (c) ….
> (d) the exact nature of the relief sought.
> (e) ….
> (f) ….. ."

26. The import of the rule is that a notice of appeal must have a relief which is exact in nature. The phrase "exact nature of relief" has been defined by this Court in many judgments. See *Bonde v National Foods & Ors* SC 11/21 at p 8, wherein this Court stated the following:

> "The phrase 'exact nature of relief sought' means that the appellant must inform the Court of the relief he/she wants. The Supreme Court's mandate is to examine the correctness or otherwise of a decision of the lower court. In doing so the court is guided by the relief sought by the appellant. The need for relief sought on appeal to be exact cannot be over emphasized."

27. It is imperative to scrutinize the relief sought by the appellant on appeal, for purposes of illustrating that the relief is not exact thereby rendering the notice of appeal fatally defective.

> "**TAKE FURTHER NOTICE THAT** the appellant seeks the following relief:
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> 1. That the appeal be allowed with each party bearing its own costs and the court *a quo's* judgment is set aside.
> 2. The decision of the court *a quo* be substituted with the following:

2.1 The application for referral of constitutional issues to the Constitutional Court for determination succeeds with costs.

2.2. The application for leave to appeal to the Supreme Court case number LC/H/APP/552/18, be and is hereby stayed pending the determination of the constitutional issues by the Constitutional Court.

2.3. The following constitutional issues be and are hereby referred to the Constitutional Court of Zimbabwe for determination.

2.3.1. That the respondent's non-executive board members, the respondent's board or the respondent had no and have no *locus standi*, in any matter relating to the termination of the contract of employment of the appellant and any quantification proceedings with the appellant, and have no right to be heard in this Court in terms of ss 4,6,7,8,9,11,13,23, 20(1) First Schedule

Section 21 (1) (sic) POWERS OF AUTHORITY, paras 12 and 33 of the Agricultural and Rural Development Authority Act [*Chapter 18:01*] as read with s 5 of Statutory Instrument 5 of 2006 to take any action it took in his matter.(SIC) The respondent's role is only that of being a Paymaster and is cited firstly in that capacity, and secondly, for usurping the powers not vested in terms of the Agricultural and Rural Developments Authority Act [Chapter 18:01] and finally for infringing the appellant's fundamental rights(SIC). The Arbitrator's Awards, Labour Court judgments and Supreme Court judgments are nullity at law. The respondent's board, the respondent, the Arbitrators and the Courts have infringed and re infringing the appellant's constitutional and fundamental rights as enshrined in ss 11 and 18(1) of the former Constitution of Zimbabwe and ss 3 (1) (a) (b), (c), (d), (h) 45 (2), 46, 47, 50 (1), 57 (c), 65 (1), 65 (4), 68 (1), 68 (2), 71 (3), and 71 (4) of the Constitution of Zimbabwe (No 20) Act, 2013.

2.3.2. The respondent is non-executive board members.(SIC) The respondent's board, the respondent, the arbitrators and the Courts, in the process of the determination of the issues placed before them failed out in accordance with law governing the proceedings to the extent that they were and are disabled by the law to terminate the appellant's contract of employment in terms of ss 23, 20 (1) First Schedule [Section 21(1)] sic PWERS OF AUTHORITY, paragraph 12 and 33 of the Agricultural and Rural Development Authority Act as read with section 5 of Statutory Instrument 15 of 2006. The respondent's role is only that of a paymaster and is cited, firstly, in that capacity, and secondly, for usurping the powers not vested in it in terms of the Agricultural and Development Authority Act and finally, for infringing the appellant's fundamental rights. The Respondent's non-executive board

> members, the respondent's board, the respondent, the arbitrators and the courts have infringed and are infringing the appellant's constitutional and fundamental rights as enshrined in sections 11 and 1891) of the former constitution of Zimbabwe and ss 3 (1) (a) (b), (c), (d), (h) 45 (2), 46, 47, 50 (1), 57 (c), 65 (1), 65 (4), 68 (1), 68 (2), 71 (3), and 71 (4) of the Constitution of Zimbabwe (No 20) Act, 2013.
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> 2.3.3 ---
> 2.3.4 ---
> 2.3.5---
> 2.3.7---
> 2.3.8The appellant's premature termination of employment, illegal termination of employment and/or invoking the principle of retrospectivity have the effect of taking away the appellant's vested right to back pay (salaries and benefits), infringed and infringes the appellant's constitutional and fundamental rights as enshrined in section 16(1) pof the former Constitution of Zimbabwe and sections 3(1)(k), 62(2), 62(3), 71(1) and 71(4) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013."(**sic**)

28. From the excerpt of the relief quoted above, it is not clear what the applicant is seeking in the notice of appeal. This, on its own, renders the notice of appeal fatally defective. It is not in compliance with the rules of this Court. It will therefore suffer the fate of being struck off the roll as it is defective and cannot be condoned or amended. Wary of the fact that the applicant is a self-actor and his documents filed of record were replete with defects time was consciously taken to highlight the defects for the applicant to probably attend to and rectify his papers but it appears the applicant was resolute there were no defects. The persistence however, did not cure the defects.

29. In the *Zimind Publishers (Pvt) Ltd* case (*supra)* at pp 5-6, the following pertinent remarks were made by this Court:

> "A judge in chambers must seriously interrogate the question of prospects of success given that in an application of this nature, the judge is the gate keeper ensuring that only meritorious matters are brought before a full bench. This was

aptly emphasized in the case of *Makwabarara* v *City of Harare & Ors* SC 139/20 at p 8, wherein the court held that:

> 'I must take the point that I am not sitting to determine the appeal itself. The duty of the judge in an application of this nature is to evaluate the grounds of appeal to be relied on to see whether the appeal is arguable. It is the function of a gatekeeper to keep out those applicants who do not have arguable cases. See *Prosecutor General* v *Intratrek & Ors* SC 59/19.'

The foregoing sentiments were adopted in *Chitambira* v *Mega Pack Zimbabwe Limited* SC 108/23 at p 9, wherein MATHONSI JA held the following:-

> 'In addition, it is settled that the role of the court or judge in an application for leave to appeal is that of a gatekeeper to keep out meritless appeals while allowing in only those with merits. The court or judge does that in order to protect the appeal court from those chancers only bent on wasting the court's time with baseless appeals. Therefore, in order to succeed in an application for leave, the application for leave, the applicant must show reasonable prospects of success on appeal.'"

30. The same reasoning in the cases cited above applies with equal force in this purported application for condonation for late noting of an appeal, in which the founding affidavit does not motivate and explain the delay neither does it relate to prospects of success but merely mentions their existence. The applicant 's oral submissions did not cure the deficiencies in the founding affidavit. Further, in that respect, it is important to stress that the relief sought is defective, such that there is nothing for an appeal court to deal with. The founding affidavit and relief being fatally defective, there is no proper application before the court.

31. The respondents did not participate hence there is no need for an order for costs. It is for the above reasons that the matter was struck off the roll with no order as to costs.