

REPORTABLE (52)

(1) DON NYAMANDE (2) KINGSTONE DONGA
v
ZUVA PETROLEUM

CONSTITUTIONAL COURT OF ZIMBABWE
HARARE JULY 31 & AUGUST 1, 2015

IN CHAMBERS

L. Madhuku, for the applicants

I. Chagonda, for the respondent

APPLICATION FOR URGENT SET DOWN OF APPEAL TO CONSTITUTIONAL
COURT

ZIYAMBI JCC:

[1] On 23 July, 2015, the applicants filed a notice of appeal to the Constitutional Court against a judgment of the Supreme Court dismissing their appeal. This is an application for the appeal to be set down for hearing on an urgent basis.

[2] At the onset of the hearing of the application, I invited Mr *Madhuku* to address me on: whether the applicants have a right of appeal, in terms of the Constitution of Zimbabwe, from a judgment of the Supreme Court; and whether or not the applicants had made out a case on the papers, for an urgent hearing of the matter.

[3] Mr *Madhuku* submitted that the applicants derive their right of appeal from s 167(5)(b) as read with s 169 (1) of the Constitution. The provisions are set out hereunder. Great emphasis was placed on the underlined words.

“167 Jurisdiction of Constitutional Court

(1)–(4)....

(5) Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court—

(a) to bring a constitutional matter directly to the Constitutional Court;

(b) to appeal directly to the Constitutional Court from any other court;

(c) to appear as a friend of the court.

169 Jurisdiction of Supreme Court

(1) The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction”.

[4] As I understand it, the submission was that sub s (5) (b) grants a right of appeal to the applicants in a case such as this where the alleged violation, by the Supreme Court, of the applicants’ constitutional right in terms of s 56(1) of the Constitution¹ only became

¹ **56 Equality and non-discrimination**

(1) All persons are equal before the law and have the right to equal protection and benefit of the law

apparent after the judgment was handed down. In these circumstances, so it was submitted, the applicants could approach this Court directly on appeal.

- [5] He further submitted, although this was denied by Mr Chagonda, for the respondent, that in his heads of argument before the Supreme Court, the constitutional issue based on a possible violation of s 56(1) of the Constitution was raised. In answer to the question as to why he had not proceeded in terms of s 175 (4) which allows him to request a referral of the issue to the Constitutional Court, he replied that s 175 (4) was not the only way of approaching the Constitutional Court and that since the violation was only apparent after the judgment was delivered, the applicants were entitled in terms of s 167(5) (b) to appeal directly to the Constitutional Court. As authority for this proposition he referred to the following South African cases:

NEHAWU V UNIVERSITY OF CAPE TOWN & ORS 2002(4) BLLR 311 (LAC);
Z.SIDUMO & ANOR V RUSTENBERG PLATINUM MINES LTD 2007 ZACC 22;
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA V BADER BOP (PTY) LTD 2003 (3) SA 513 CC.

The first and last cases referred to are judgments in applications for leave to appeal which leave was granted and both appeals allowed. The second was in respect of an application to the Constitutional Court of South Africa. None of the judgments are of assistance in determining whether the applicants *in casu* have established a right of appeal to the Constitutional Court from a judgment of the Supreme Court.

URGENCY

- [6] On the question of urgency, Mr *Madhuku* submitted that the test for urgency is ‘not the same’ in constitutional matters. He submitted that the urgency in this case arises not from

the personal circumstances of the applicants, but from the public interest and the public importance of the case. Consideration had to be given to the interests of society and judicial notice ought to be taken that thousands of people had already lost their jobs since the judgment sought to be appealed against was delivered. Neither in the certificate of urgency nor in his submissions before me was any reference made to any circumstances of the applicants which might give rise to a need for an urgent hearing of the matter.

RESPONDENT'S SUBMISSIONS

[7] On the question of the right of appeal, Mr *Chagonda* submitted that the alleged appeal said to be pending before the Constitutional Court is in fact a nullity as the applicants have no right of appeal against the judgment of the Supreme Court.

He submitted that an appeal invites a superior court to determine the correctness of the lower court's decision on issues which were placed before it. There were no constitutional issues placed before the Supreme Court for determination, or determined by the Supreme Court. There could, therefore, be no right of appeal since no decision was made by that court on constitutional matters.

[8] It was further submitted that the proper recourse available to the applicants was to bring an application in terms of s 85 of the Constitution if it was felt that a breach of their fundamental rights had occurred.

[9] On the question of urgency, Mr *Chagonda* submitted that there was no urgency justifying the order sought by the applicants. The matter commenced as a simple labour dispute

which was finally heard on appeal, by the Supreme Court, in February 2015. At no stage during the protracted proceedings which commenced at the respondent's workplace and from there moved to the Labour Officer, the arbitrator, the Labour Court and finally the Supreme Court, was there ever any question of the matter being determined on an urgent basis.

[10] The cases of other employees whose employment had been terminated were not before this Court, never were, and are not in any way linked to the applicants' case.

It was submitted that on both grounds, the application ought to be dismissed.

DISPOSITION

[11] Having considered the submissions by the parties I agree with Mr *Chagonda* that the applicants have not established any right to approach the Constitutional Court by way of appeal. Section 167(5) relates to rules of procedure regulating the manner of approach to this Court on appeal from lower courts. It does not confer a right to appeal to the Constitutional Court on a litigant who has no right of appeal. For this right, the litigant must look elsewhere in the Constitution. In my view, such a right may be read into s 175 (3) of the Constitution which applies where an order of constitutional invalidity of any law has been made by a court. Failing that, a right of appeal could only arise where the Supreme Court makes a decision on a constitutional matter.

[12] The applicants have not alleged that s 175 (3) applies in their case. Since no constitutional issue was determined by the Supreme Court, no appeal can lie against its decision². It follows that the applicants have not established a right of appeal to the Constitutional Court and any appeal filed in this matter by the applicants is a nullity as it conflicts with the provisions of s 169(1) of the Constitution.

[13] The above finding is dispositive of the application. I must, however, note that even if the applicants had established a right of appeal to the Constitutional Court, the application would have been dismissed on the basis that no urgency has been established which would justify the grant of the order sought.

The only basis on which the order was sought is that “several employees have had their contracts of employment indiscriminately terminated on notice and the Court should take judicial notice of this development”. The employees referred to are not parties to this application. I therefore agree with Mr *Chagonda* that no basis was established for the grant of the order sought by the applicants.

[14] Accordingly the application is dismissed with costs.

Matsikidze & Mucheche, applicants’ legal practitioners

Atherstone & Cook, respondent’s legal practitioners

² Section 169(1) of the Constitution of Zimbabwe